(8)

No. 99-137-CFX

Title: J. Wayne Garner, Former Chairman of the State Board of Pardons and Paroles of Georgia, et al., Petitioners
v.
Robert L. Jones

Docketed:
July 20, 1999

Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Jul 19 1999	Petition for writ of certiorari filed. (Response due August 19, 1999)
	Aug 19 1999	Brief of respondent Robert L. Jones in opposition filed.
	Aug 19 1999	Motion of respondent for leave to proceed in forma pauperis filed.
	Sep 1 1999	DISTRIBUTED. September 27, 1999
	Sep 28 1999	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Sep 28 1999	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 12, 1999. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. Rule 29.2 does not apply. SET FOR ARGUMENT January 11, 2000. **********
	Nov 12 1999	Joint appendix filed.
	Nov 12 1999	Brief of petitioners J. Wayne Garner, et al. filed.
	Nov 26 1999	Record filed.
	Dec 6 1999	CIRCULATED.
	Dec 6 1999	Brief of respondent Robert L. Jones filed.
	Dec 13 1999	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Dec 30 1999	Reply brief of petitioners J. Wayne Garner, et al. filed.
	Dec 30 1999	LODGING consisting of twenty copies of a statistical report and a Georgia Parole Board study submitted by counsel for the petitioner and distributed.
	Jan 11 2000	ARGUED.

Supreme Court, U.S.
FILED

No. 99 137 JUL 19 1999

OFFICE OF THE CLERK

In The

Supreme Court of the United States

J. WAYNE GARNER, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, JAMES T. MORRIS, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, GARFIELD HAMMONDS, JR., former Chairman of the State Board of Pardons and Paroles of the State of Georgia, BOBBY K. WHITWORTH, Member of the State Board of Pardons and Paroles of the State of Georgia, and TIMOTHY E. JONES, former Member of the State Board of Pardons and Paroles of the State of Georgia,

Petitioners,

v.

ROBERT L. JONES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Georgia, through its State Board of Pardons and Paroles, makes provision for the exercise of executive clemency in the case of individuals convicted of violations of Georgia's criminal statutes. Both the Supreme Court of Georgia and the United States Court of Appeals for the Eleventh Circuit have surveyed the relevant Georgia statutory and constitutional provisions and have concluded that the Board, in the exercise of the clemency power, exercises "virtually unfettered discretion."

Except as otherwise provided by law, inmates serving sentences of life imprisonment become eligible for the exercise of the Board's powers after the service of seven years' imprisonment. The Board is authorized to provide, by regulation, for eligibility for reconsideration of those inmates considered for, but denied, parole.

The questions presented are:

1.

Whether the ex post facto clause of the United States Constitution bars the State from applying its amended regulation governing the reconsideration schedule for life-sentenced inmates who have been denied parole, when the amendment has no effect on the sentence imposed, the substantive formula for the consideration of the prisoner for parole, or the determination of the prisoner's eligibility for parole, or whether the change creates only "the most speculative and attentuated possibility of producing the prohibited effect of increasing the measure of punishment."

QUESTIONS PRESENTED – Continued

2.

Whether the decision below conflicts with the decisions of other United States Courts of Appeals and the appellate courts of the several states as to the meaning and import of this Court's decisions in *California Dep't of Corrections v. Morales* and *Lynce v. Mathis*.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the Court of Appeals and in the District Court were as listed in the caption. For the purposes of Respondent's claims for declaratory and injunctive relief, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Petitioners are Walter S. Ray, Chairman, Bobby K. Whitworth, Garfield Hammonds, Jr., Dr. Betty Ann Cook, and Dr. Eugene P. Walker, the current members of the Board.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	2
STATEMENT	2
A. CLAIMS AND FACTS	2
B. PROCEEDINGS BELOW	4
REASONS FOR GRANTING THE WRIT	5
I. THE ELEVENTH CIRCUIT PLACED THE BURDEN OF PROOF ON PETITIONERS, CONTRARY TO THE HOLDINGS OF THIS COURT, THE FOURTH CIRCUIT, AND THE NINTH CIRCUIT	5
II. THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THE RECENT DECISIONS OF THIS COURT AND THE CONSTRUCTION OF THOSE DECISIONS BY THE OTHER CIRCUITS AND THE APPELLATE COURTS OF THE SEVERAL STATES	6
CONCLUSION	9
INDEX TO APPENDIX	ia
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	Page
Akins v. Snow, 922 F.2d 1558 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991)	3, 4, 5, 7
Allison v. Kyle, 66 F.3d 71 (5th Cir. 1995)	8
Bailey v. Noot, 503 U.S. 952, 112 S.Ct. 1516, 117 L.Ed.2d 652 (1992)	7
California Dep't of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995)	3, 4, 5, 6, 7
Fletcher v. Williams, 179 Ill. 2d 225, 688 N.E.2d 635 (1997)	8
Furnari v. Zavaras, 914 P.2d 508 (Colo. App. 1996)	8
Hamm v. Latessa, 72 F.3d 947 (1st Cir. 1995), *cert. denied*, 519 U.S. 836 (1996)	7
Hill v. Jackson, 64 F.3d 163 (4th Cir. 1995)	8
Johnson v. Gomez, 92 F.3d 964 (9th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997)	6
Jones v. Garner, 164 F.3d 589 (11th Cir. 1999)	1, 5
Jones v. Georgia State Board of Pardons and Paroles, 59 F.3d 1145 (11th Cir. 1995)	2
Jordan v. Tennessee Board of Paroles, 1997 Tenn. App. LEXIS 27 (Tenn. App. January 15, 1997)	8
Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997)	5, 6
Phelps v. Traugher, 1996 U.S. App. LEXIS 8009 (6th Cir. Tenn. Mar. 20, 1996)	8
Roller v. Gunn, 107 F.3d 227 (4th Cir.), *cert. denied*, 522 U.S. 874 (1997)	5, 6, 8
Shabazz v. Gabry, 123 F.3d 909 (6th Cir.), *cert. denied*, 522 U.S. 1019 (1997)	8

TABLE OF AUTHORITIES – Continued

Page

Tuff v. State, 1999 Fla. App. LEXIS 6424 (Fla. App. May 19, 1999) 8

Vargas v. Morris, 266 Ga. 141, 465 S.E.2d 275, *cert. denied sub nom Vargas v. Garner*, ___ U.S. ___, 116 S.Ct. 1329, 134 L.Ed.2d 480 (1996) 2

STATUTES

O.C.G.A. § 42-9-45(a) 2

O.C.G.A. § 42-9-45(b) 2

Ga. Admin. Comp. Ch. 475-03-.05(2) 3, 5

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding on January 6, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Jones v. Garner*, 164 F.3d 589 (11th Cir. 1999), and is printed as Appendix A, *infra*, 1a. The order on the merits by the United States District Court for the Northern District of Georgia, No. 1:95-cv-3012-CAM (August 25, 1997), is printed as Appendix B, *infra*, 20a.

JURISDICTION

The court of appeals entered its opinion and judgment on January 6, 1999 (App. A, *infra*, 1a) and entered its denial of Petitioners' Motion For Rehearing and Suggestion of Rehearing En Banc on April 19, 1999 (App. C, *infra*, 30a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 10:

> No State shall . . . pass any . . . ex post facto Law . . . .

STATEMENT

A. Claims and Facts

The State of Georgia, through its State Board of Pardons and Paroles, makes provision for the exercise of executive clemency in the case of individuals convicted of violations of Georgia's criminal statutes. Both the Supreme Court of Georgia and the United States Court of Appeals for the Eleventh Circuit have surveyed the relevant Georgia statutory and constitutional provisions and have concluded that the Board, in the exercise of the clemency power, exercises "virtually unfettered discretion." *Jones v. Georgia State Board of Pardons and Paroles*, 59 F.3d 1145, 1150 (11th Cir. 1995); *see also Vargas v. Morris*, 266 Ga. 141, 465 S.E.2d 275, *cert. denied sub nom Vargas v. Garner*, ___ U.S. ___, 116 S.Ct. 1329, 134 L.Ed.2d 480 (1996).

Except as otherwise provided by law, inmates serving sentences of life imprisonment become eligible for the exercise of the Board's powers after the service of seven years' imprisonment. O.C.G.A. § 42-9-45(b). The Board is authorized to provide, by regulation, for eligibility for reconsideration of those inmates considered for, but denied, parole. O.C.G.A. § 42-9-45(a).

Prior to 1979, the Board's regulations provided that life sentenced inmates considered for, but denied, parole

would be reconsidered on an annual basis. In 1979, due to increases in the prison population, the Board amended its regulation so as to provide for reconsideration of these inmates no less than every three years (while retaining the discretion to consider the inmate sooner). This amendment was applied by the Board to all life-sentenced inmates, including those whose crimes had been committed prior to 1979.

In 1985, as Georgia's prison population continued to increase, and in an attempt to provide life sentenced inmates with a more realistic assessment of their chances for release on parole, the Board again amended its policy to provide for parole reconsideration no less than every eight years. Again, the Board retained the discretion to consider the prisoner more frequently. This amendment was likewise applied to all life-sentenced inmates, including those whose crimes had been committed prior to 1979. Ga. Admin. Comp. Ch. 475-03-.05(2).

Prisoners convicted of crimes committed prior to 1985 challenged the retroactive application of the amended regulation. The United States Court of Appeals for the Eleventh Circuit found that the retroactive application of the amended regulation violated the ex post facto clause. *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991).

In 1995, this Court decided the case of *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995). In *Morales*, this Court ruled that a retroactive application of a revision to the schedule for the reconsideration of prisoners previously denied parole was not an ex post facto violation, so long as the change created no real, practical effect

upon the prisoner's chances for parole. Based upon advice from the Attorney General of Georgia that the Court's decision in *Morales* was inconsistent with the Eleventh Circuit's holding in *Akins*, the Board resumed retroactive application of its amended regulation.

On July 23, 1974, Respondent had been sentenced to life imprisonment following his conviction for the murder of Jack Bell in the Superior Court of Fulton County, Georgia. On November 24, 1979, Respondent escaped from custody. While on escape, Respondent murdered Frances Tutt Davis. Respondent was convicted of her murder, and again sentenced to life imprisonment, in the Superior Court of Fulton County on August 20, 1982.

Respondent was initially considered for, and denied, parole in September, 1989. He was reconsidered, and again denied, in September, 1992. Respondent was considered a third time, and again denied parole, in September, 1995. At that time, Respondent was advised that his next reconsideration would come within the next eight years.

B. Proceedings Below

Respondent brought suit, contending that retroactive application of the amendment violated the ex post facto clause of the United States Constitution. Respondent sought damages, as well as a declaratory judgment that the application of the amended regulation in his case violated the ex post facto clause.

Following a period of discovery, the parties filed cross-motions for summary judgment. The District Court

granted summary judgment to the Board, finding that, as in *Morales*, the amended regulation "creates 'only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment.' "

On appeal, a panel of the Eleventh Circuit reversed and remanded. The Court held that *Morales* reinforced its earlier holding in *Akins*, that the record did not support a finding that the amendment did not have the purpose or effect of increasing the quantum of punishment, and accordingly reversed the grant of summary judgment to the Board. The Court subsequently denied the Board's Motion for Rehearing with Suggestion for Rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT PLACED THE BURDEN OF PROOF UPON PETITIONERS, CONTRARY TO THE HOLDINGS OF THIS COURT, THE FOURTH CIRCUIT, AND THE NINTH CIRCUIT.

The Eleventh Circuit placed upon Petitioners the burden of showing that the application of Ga. Admin. Comp. Ch. 475-3-.05(2) would not pose a risk of increasing Plaintiff's sentence. *Jones*, 164 F.3d at 596. This was plain error. In any ex post facto inquiry, the burden is on the prisoner to demonstrate that the law in question will, as applied to his case, violate the ex post facto clause. *Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891, 897-98 (1997) explaining *California Dep't of Corrections v. Morales*, 514 U.S. ___, 115 S.Ct. 1597 (1995). *See also Roller v. Gunn*, 107 F.3d 227, 237 (4th

Cir.), *cert. denied*, 522 U.S. 874 (1997), quoting *Johnson v. Gomez*, 92 F.3d 964, 968 (9th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997) (after *Morales*, the prisoner bears the burden of demonstrating " . . . 'with assurance' . . . that he would have received parole under the old system"). The Eleventh Circuit erred in shifting this burden to the Board. The transfer of the burden of proof was plain error and conflicts squarely with this Court's own explanation of its holding in *Morales*. This decision also conflicts with the decisions of the Fourth and Ninth Circuits, which have squarely placed the burden of proof on the prisoner.

II. THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THE RECENT DECISIONS OF THIS COURT AND THE CONSTRUCTION OF THOSE DECISIONS BY THE OTHER CIRCUITS AND THE APPELLATE COURTS OF THE SEVERAL STATES.

This Court has recently illustrated the proper approach to applying the ex post facto clause in *California Dep't of Corrections v. Morales*, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995), and *Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1996). When "[t]he amendment creates only the most speculative and attenuated possibility of increasing the measure of punishment for covered crimes," *Morales*, 514 U.S. at 509, and "the change at issue ha[s] neither the purpose nor the effect of increasing the quantum of punishment," *Lynce*, 117 S.Ct. at 897, then the retroactive application of a new statute, regulation, or procedure does not violate the ex post facto clause.

In the case at bar, it is clear that application of the "set off" regulation to Respondent will not affect his ultimate date of release. Once an inmate becomes eligible for parole, the Board exercises unfettered discretion in determining whether or not to grant parole in an individual case and, if so, when release is to be granted. Stated bluntly, the Board has determined that, based upon the facts known to the Board about his case, Respondent may not reasonably expect to be paroled within the next eight years. It defies reason to suggest, as the Eleventh Circuit has done, and as proper ex post facto jurisprudence would require if that decision be sustained, that mere repetitive viewing of his file during the interim would change that conclusion.

In the short time since *Akins* was decided, it has been widely cited for its application of the ex post facto clause.[1] As Justices White and Blackmun prophetically noted, the Circuits were divided on the issue of the proper application of the ex post facto clause to parole reconsideration schedules as early as 1992 and, as they also predicted, the issue arises frequently. *Bailey v. Noot*, 503 U.S. 952, 112 S.Ct. 1516, 117 L.Ed.2d 652 (1992) (White, J., dissenting). Subsequent to *Morales*, the First,[2]

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[1] Shepard's citations showed "21 Citing References" to *Akins, supra*, on July 12, 1999.

[2] *Hamm v. Latessa*, 72 F.3d 947, 957-59 (1st Cir. 1995), *cert. denied*, 519 U.S. 836 (1996).

Fourth,[3] Fifth,[4] and Sixth[5] Circuits have expressly rejected the Eleventh Circuit's application of ex post facto principles to parole reconsideration scheduling, as have state appellate courts in Colorado,[6] Florida,[7] Illinois,[8] and Tennessee.[9] In light of the split in the circuit courts and state appellate courts on this issue, and the current activity in the district courts, the federal courts most certainly will continue to be faced with the question of the proper application of the ex post facto clause to parole reconsideration schedules. This Court should accept certiorari of this important decision now, rather than to delay and allow this confusion, with its disruption of state planning and budgeting, to continue.

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[3] *Roller v. Gunn*, 107 F.3d 227, 234-37 (4th Cir.), *cert. denied*, 522 U.S. 874 (1997); *Hill v. Jackson*, 64 F.3d 163, 167-71 (4th Cir. 1995).

[4] *Allison v. Kyle*, 66 F.3d 71, 74-75 (5th Cir. 1995).

[5] *Shabazz v. Gabry*, 123 F.3d 909, 913-916 (6th Cir.), *cert. denied*, 522 U.S. 1019 (1997); *Phelps v. Traugher*, 1996 U.S. App. LEXIS 8009 (6th Cir. Tenn. Mar. 20, 1996).

[6] *Furnari v. Zavaras*, 914 P.2d 508, 509-11 (Colo. App. 1996).

[7] *Tuff v. State*, 1999 Fla. App. LEXIS 6424 (Fla. App. May 19, 1999).

[8] *Fletcher v. Williams*, 179 Ill. 2d 225, 235-36, 688 N.E.2d 635, 641-42 (1997).

[9] *Jordan v. Tennessee Board of Paroles*, 1997 Tenn. App. LEXIS 27 (Tenn. App. January 15, 1997).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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INDEX TO APPENDIX

		Page
Appendix "A"	Opinion of the Court of Appeals	1a
Appendix "B"	Decision of the United States District Court For the Northern District of Georgia	20a
Appendix "C"	Denial of Motion for Rehearing and Suggestion of Rehearing En Banc	30a

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-9009

D. C. Docket No. 1:95-cv-3012-CAM

ROBERT L. JONES,

Plaintiff-Appellant,

versus

J. WAYNE GARNER, Employed as Chairman,
State Board of Pardons and Paroles, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(January 6, 1999)

Before BIRCH and BARKETT, Circuit Judges, and HANCOCK*, Senior District Judge.

BARKETT, Circuit Judge:

Robert Jones appeals the district court's order granting summary judgment to defendants J. Wayne Garner and other former and current members of the Georgia Board of Pardons and Paroles ("the Board") on Jones' claim that the retroactive application of amendments to

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* Honorable James H. Hancock, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

the Georgia regulations governing parole consideration, Ga. Comp. R. & Regs. r. 475-3-.05.(2) (1986), violated the Ex Post Facto Clause of Article I, § 10 of the United States Constitution. In *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991), we held that retroactive application of r. 475-3-.05(2) violated this clause's prohibition on ex post facto laws. After the Supreme Court decided *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995), in which it held that the retroactive application of a legislative amendment to the California parole regulations that decreased the frequency of parole suitability hearings in certain circumstances did not represent an ex post facto violation, the Board concluded that *Akins* had been overruled and scheduled Jones' next hearing for 2003 pursuant to the rule promulgated in 1986. The district court agreed that *Morales* overruled *Akins*, and granted summary judgment to the defendants. We find that *Morales* reinforced our holding in *Akins*, and pursuant to *Morales* and *Akins*, we REVERSE.

I. Background

The facts of this case are not in dispute. In July 1974, Jones was sentenced in the Superior Court of Fulton County, Georgia, to life in prison for murder. In August of 1982 he was again sentenced in the same court to life in prison for murder on subsequent charges. At the time of Jones' second offense, the state regulations governing parole consideration required that he first be considered for parole after seven years and, if parole was not granted at that time, that he be considered every three years thereafter. After Jones was incarcerated but before he was initially considered for parole, the Board amended its

rules to require that parole reconsideration take place only once every eight years. *See* Ga. Comp. R. & Regs. r. 475-3-.05.(2).[1]

Jones was initially considered for parole in 1989, seven years after his 1982 conviction, and parole was denied. At that time, rather than scheduling Jones for a rehearing after three years as provided for by the Board rules at the time of the offense, the Board scheduled Jones for reconsideration eight years later, in 1997. In the meantime, however, this Court decided *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991), in which it held that the retroactive application of r. 475-3-.05.(2) violated the Ex Post Facto Clause of Article I, § 10 of the United States Constitution. As a result, Jones was reconsidered for parole in three year intervals, in 1992 and again in 1995. In 1995, however, the Supreme Court decided *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995). The Board read *Morales* to overrule *Akins*, and as a consequence, rather than scheduling Jones' next consideration for 1998, the Board scheduled Jones for reconsideration in 2003 (eight years later).

---

[1] As amended, the regulation relating to frequency of parole reconsideration reads as follows:

> Reconsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possible discouraging diagnostic opinions.

Ga. Comp. R. & Regs. r. 475-3-.05.(2).

In 1995, following the Board's rescheduling of his next parole reconsideration for 2003, Jones filed a pro se § 1983 action in the Northern District of Georgia, alleging that the Board's action violated several of his constitutional rights. The district court dismissed his complaint as frivolous on all counts. Jones appealed the dismissal, and a panel of this Court reversed in part, finding Jones's allegation of an Ex Post Facto Clause violation not to be frivolous. On remand, both parties filed motions for summary judgment. The district court granted defendant's motion for summary judgment and denied Jones' motion on the ground that *Morales* had overruled *Akins*. Jones now appeals.

II. Discussion

The Constitution provides that "[n]o State shall . . . pass any . . . ex post facto Law. . . . " U.S. Const. art. I, § 10, cl. 1. At the time of the drafting of the Constitution, the phrase " 'ex post facto law' was a term of art with a well-established meaning." *Akins v. Snow*, 922 F.2d at 1560. In *Calder v. Bull*, 3 U.S. (Dall.) 386 (1798), the Supreme Court "identified several legislative acts that clearly implicated the core concerns" with respect to ex post facto laws that existed at the time the Constitution was written. *Akins*, 922 F.2d at 1560-61. Included in such legislative acts was any law " . . . that *changes the punishment*, and *inflicts a greater punishment*, than the law annexed to the crime, when committed." *Akins*, 922 F.2d at 1560-61 (quoting *Calder*, 3 U.S. (Dall.) at 390 (emphasis in original)). The Supreme Court's ex post facto rulings have continued to adhere to the original principle that

laws with this effect violate the Constitution's ex post facto prohibition. *See id.* (collecting cases).[2]

Aikins v. Snow

In *Akins*, this Court considered an ex post facto challenge to the retroactive application of the amendments to Georgia's regulations governing parole consideration at issue here, *see* Ga. Comp. R. & Regs. r. 475-3-.05.(2), and held such application to violate the proscription against laws " 'that *change*[ ] *the punishment*, and *inflict*[ ] *a greater punishment* than the law annexed to the crime when committed.' " *Akins*, 922 F.2d at 1560-61 (quoting *Calder*, 3 U.S. (Dall.) at 390 (emphasis in original)). When the crimes for which the petitioners in *Akins* were convicted were committed, "the Board's rules required the Board to initially consider an inmate serving a life term for parole after serving seven years of his life sentence." *Id.* at 1560. If the inmate was denied parole at that time, he would receive reconsideration every year thereafter. *See id.* The regulation was subsequently amended so that "[parole r]econsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years." Ga. Comp. R. & Regs. r. 475-3-.05.(2). Applying the two-pronged test for Ex Post Facto Clause violations established by the Supreme Court in *Weaver v.*

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[2] *Miller v. Florida*, 482 U.S. 423, 429 (1987); *Weaver v. Graham*, 450 U.S. 24, 28 (1981); *Dobbert v. Florida*, 432 U.S. 282, 292 (1977); *Lindsey v. Washington*, 301 U.S. 397, 401 (1937); *Rooney v. North Dakota*, 196 U.S. 319, 324-325 (1905); *In re Medley*, 134 U.S. 160, 171 (1890); *Cummings v. Missouri*, 71 U.S. 277, 325-326 (1867); *Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798).

Graham, 450 U.S. 24, 29 (1981),[3] we found both that the Georgia regulation was retroactive and that, by creating significant delays between parole reconsideration hearings, the application of the regulation "substantially disadvantages a prisoner." *Akins*, 922 F.2d at 1564.[4]

California Dep't of Corrections v. Morales and Lynce v. Mathis

Four years later, the Supreme Court entertained an ex post facto challenge to retroactive application of an amended California Department of Corrections regulation governing parole eligibility. *See California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995). At the time that Morales committed the crime for which he was incarcerated, the California parole consideration regulations specified that, once an inmate became eligible for an initial parole consideration hearing, if the inmate was

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[3] First, the law must be "retrospective, that is, it must apply to events occurring before its enactment. . . . " *Weaver*, 450 U.S. at 29. Second, the law must "disadvantage the offender affected by it." *Id.* (quoted in *Akins*, 922 F.2d at 1563).

[4] In *Akins*, we addressed three preliminary questions as a predicate to making the ultimate ex post facto determination. Specifically, we found that: (1) Georgia's administrative regulation governing parole reconsideration is a "law" for purposes of the Ex Post Facto Clause, *see Akins*, 922 F.2d at 1561; (2) that a parole reconsideration hearing is part of a prisoner's parole eligibility, *id.* at 1561-62; and (3) that, because parole eligibility is part of an offender's punishment, "for ex post facto purposes, parole eligibility must be considered part of any sentence." *Id.* at 1563. None of these holdings has been called into question either by the Supreme Court's decision in *Morales*, 514 U.S. 499 (1995), or by the parties on appeal.

denied parole at that time, he or she would be eligible for annual reconsideration. *See id.* at 503. Subsequent to Morales' sentencing, however, the California legislature amended the regulation to authorize the Board of Prison Terms "to defer subsequent suitability hearings for up to three years if the prisoner has been convicted of 'more than one offense which involves the taking of a life' and if the Board 'finds that it is not reasonable to expect that parole would be granted at a hearing during the following [two] years and states the bases for the findings.' " *Id.* (quoting Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982)).

In *Morales*, the Supreme Court rejected an expansive reading of the Ex Post Facto Clause as forbidding any and all legislative change having any conceivable risk of affecting a prisoner's punishment. *See id.* at 508. Instead, the Court found it to be "a matter of 'degree' " as to which "legislative adjustments 'will be held to be of sufficient moment to transgress the constitutional prohibition [on ex post facto laws].' " *Id.* at 509 (quoting *Beazell v. Ohio*, 269 U.S. 167, 171 (1925)). Declining to provide a universal formula for identifying legislative changes that violate the ex post facto prohibition, *id.*, the Court directed that each case be analyzed by asking "whether [the law at issue] produces a sufficient risk of increasing the measure of punishment attached to the covered crimes," *id.*, and proceeded to apply this standard to the California statute at issue in *Morales*.

First, the Court noted that the regulation as amended applies "only to a class of prisoners for whom the likelihood of release on parole is quite remote": those prisoners "who have been convicted of 'more than one

offense which involves the taking of a life.' " *Id.* at 510 (quoting Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982)).

Second, the Court found that the California amendment was intended only "as a means 'to relieve the [state's Board of Prison Terms] from the costly and time-consuming responsibility of scheduling parole hearings for prisoners who have no chance of being released,' " *id.* at 511 (quoting *In re Lawrence A. Jackson*, 39 Cal.3d 464, 473 (1985) (quoting legislative history)) – and not to increase the punishment of the affected offenders. The Court found the measure to be "carefully tailored" to the end of saving time and money, *id.*, and to incorporate several safeguards to ensure that its application does not result in extending the sentence of a prisoner who would be eligible for parole in the intervening two years. *See id.* Specifically, the Court noted that "the amendment has no effect on any prisoner unless the Board has first concluded, after a hearing, not only that the prisoner is unsuitable for parole, but also that 'it is not reasonable to expect that parole would be granted at a hearing during the following years.' " *Id.* at 511 (quoting § 3041.5(b)(2)). In this regard, the Court particularly emphasized the statutory requirement that "the [California Board of Prison Terms] must conduct 'a full hearing and review' of all relevant facts, and state the bases for its finding." *Id.* (quoting § 3041.5(b)(2)).[5]

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[5] The Court added that "[t]hough California law is not entirely clear on this point, the reliability of the Board's determination may also be enhanced by the possibility of an administrative appeal." *Morales*, 514 U.S. at 511 (citing Tit. 15 Cal. Code of Regulations, § 2050 (1994)).

Finally, the *Morales* Court noted that, under the amended regulation, the California Board of Prison Terms retains "the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner." *Id.*; *see also id.* ("The default is an annual hearing but the Board may defer the next hearing up to two years more depending on the circumstances.") (citing § 3041.5(b)(2)). In particular, the Court found no reason to fear that a prisoner who would have been found qualified for release one or two years previous would suffer a later actual release date than he would have under the old annual review system. The Court noted that in California, it is often the case that an inmate's actual release date will come several years after a finding of suitability by the Board. *See id.* at 513. It therefore reasoned that, because the Board retained the discretion to expedite the release date of an inmate who is able to demonstrate "that he was 'suitable' for parole two years prior to such a finding by the Board," such an inmate "might well be entitled to secure a release date that reflects that fact." *Id.*

On the basis of the safeguards in place in the amended California regulation, the *Morales* Court concluded that the regulation as amended "creates only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 514. As the Court put it,

> [i]n light of the particularized findings required under the amendment and the broad discretion given to the Board, the narrow class of prisoners covered by the amendment cannot reasonably expect that their prospects for early release on

> parole would be enhanced by the opportunity of annual hearings. For these prisoners, the amendment simply allows the Board to avoid the futility of going through the motions of reannouncing its denial of parole suitability on a yearly basis.

Id. at 512. The Court therefore found no ex post facto violation. *See id.* at 514.

Subsequently, in *Lynce v. Mathis*, 519 U.S. 433 (1996), the Supreme Court found Florida's attempt to cancel retroactively the accumulated overcrowding credits awarded to inmates convicted of murder and attempted murder to be a violation of the prohibition on ex post facto laws, and in the course of so doing, provided some guidance to courts applying the standards established in *Morales*. The *Lynce* Court emphasized in particular two features of the Court's reasoning in that case. First, it underscored that the "bulk of [the Court's analysis in *Morales*] focused on the effect of the law on the inmate's sentence" and that the holding in *Morales* "rested squarely on the conclusion that 'a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings.' " *Lynce*, 117 S.Ct. at 897 (quoting *Morales*, 514 U.S. at 513); *see also id.* at 898 n.16 ("Simply put, we rejected the inmate's claim in *Morales*, because it could not be said with any certainty that the amended statutory scheme was more 'onerous' than at the time of the crime.").

Second, the *Lynce* Court emphasized the need to assess the legislature's purpose behind the change in the sentencing scheme as well as the possible effect of the change on offenders' sentences. In *Lynce*, the Court

pointed out that *Morales* never addressed the question as to whether a legislative purpose to "increas[e] the quantum of punishment" would alone "be a sufficient basis for concluding that a law violated the Ex Post Facto Clause when it actually had no such effect." *Id.* at 897. However, the Court underscored that in *Morales*, where no ex post facto violation was found, "the change at issue had neither the purpose nor the effect of increasing the quantum of punishment." *Id.* In *Lynce*, on the other hand, the Court saw no evidence that the Florida legislature effected the change at issue in that case "merely to save time or money" in those cases in which the ultimate date of release would remain entirely unaffected. Rather, the Court found "it [to be] quite obvious that the retrospective change was intended to prevent the early release of prisoners convicted of murder-related offenses who had accumulated overcrowding credits." *Lynce*, 117 S.Ct. at 897-98. This finding supported the Court's conclusion that the Florida provision violated the prohibition on ex post facto laws.

The Amended Georgia Regulation

As *Morales* and *Lynce* make clear, our inquiry regarding the retroactive application of Georgia's regulation governing parole reconsideration, r. 475-3-.05.(2), must focus on its effect on " 'a prisoner's ultimate date of release,' " *id.* at 897 (quoting *Morales*, 514 U.S. at 513), in order to determine whether the change constitutes a "sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 897 n.14 (quoting *Morales*, 514 U.S. at 509). To determine whether the retroactive application of the Georgia regulation gives rise to

such a risk, we examine the regulation in light of the factors discussed in *Morales*, and find it to be wholly distinguishable from the statute at issue in that case.

First, unlike the California statute, it cannot be said of Georgia's r. 475-3-.05.(2) that it applies "only to a class of prisoners for whom the likelihood of release on parole is quite remote." *Morales*, 514 U.S. at 510. The California statute at issue in *Morales* applied only to those inmates "who have been convicted of 'more than one offense which involves the taking of a life.' " *Id.* (quoting Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982)). The set of affected inmates is thus likely to be extremely small. The Georgia provision, in contrast, applies to all "those inmates serving life sentences," r. 475-3-.05.(2). In Georgia, it turns out, this group can include prisoners convicted of murder, *see* GA. CODE ANN. § 16-5-1; felony murder, *see id.*; rape, *see* GA. CODE ANN. § 16-6-1; armed robbery, *see* GA. CODE ANN. § 16-8-41; kidnapping for ransom, *see* GA. CODE ANN. § 16-5-40; hijacking an aircraft, *see* GA. CODE ANN. § 16-5-44; more than one count of child molestation, *see* GA. CODE ANN. § 16-6-4; perjury that was the cause of someone else being sentenced to death, *see* GA. CODE ANN. § 16-10-70; more than one count of possession or use of a machine gun, sawed-off rifle, sawed-off shotgun, or a firearm equipped with a silencer during the commission or attempted commission of a series of enumerated offenses,[6] *see* GA. CODE ANN. § 16-11-160; and

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[6] This list includes:

(1) Aggravated assault as defined in Code Section 16-5-21;

(2) Aggravated battery as defined in Code Section 16-5-24;

more than one count of a series of prohibitions on the manufacture, possession, sale, or distribution of certain controlled substances, *see* GA. CODE ANN. § 16-13-30. The set of inmates whose parole consideration will be affected by r. 475-3-.05.(2) is thus bound to be far more sizeable than the set of inmates affected by the California provision at issue in *Morales*. This set must also – unless we are to believe that the state of Georgia imposes a sentence of life in prison without parole for the entire set of offenses just enumerated – be comprised of many inmates who can expect at some point to be paroled. For this reason, we are unable to conclude that r. 475-3-.05.(2) will apply

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(3) Robbery as defined in Code Section 16-8-40;

(4) Armed robbery as defined in Code Section 16-8-41;

(5) Murder or felony murder as defined in Code Section 16-5-1;

(6) Voluntary manslaughter as defined in Code Section 16-5-2;

(7) Involuntary manslaughter as defined in Code Section 16-5-3;

(8) Sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances in violation of any provision of Article 2 of Chapter 13 of [Title 16], the "Georgia Controlled Substances Act";

(9) Terroristic threats or acts as defined in Code Section 16-11-37;

(10) Arson as defined in Code Sections 16-7-60, 16-7-61, and 16-7-62;

(11) Influencing witnesses as defined in Code Section 16-10-93; and

(12) Participation in criminal gang activity as defined in Code Section 16-15-4.

GA. CODE ANN. §16-11-160.

"only to a class of prisoners for whom the likelihood of release on parole is quite remote."

Second, unlike the California statute, the Georgia regulation cannot be said to be "carefully tailored" so as to support a finding that the measure was intended only to further the legitimate end of saving time and money and not to "increas[e] the quantum of punishment." *Lynce*, 117 S.Ct. at 897. The *Morales* Court emphasized that safeguards built into the California provision would ensure that retroactive application would not extend the sentences of those prisoners who would be otherwise eligible for parole in the years between hearings. In particular, the Court noted the statutory requirement that "the [California Board of Prison Terms] must conduct 'a full hearing and review' of all relevant facts, and state the bases for its finding" that " 'it is not reasonable to expect that parole would be granted at a hearing during the following [two] years.' " *Morales*, 514 U.S. at 511 (quoting Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982)).

The same cannot be said for the Georgia regulation. It reads, in its entirety,

> Reconsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possible discouraging diagnostic opinions.

Ga. Comp. R. & Regs. r. 475-3-.05.(2). The Board is not required to make any particularized findings supporting its conclusion that, as to the inmate under consideration, "it is not reasonable to expect that parole would be

granted" during the intervening eight years before the next hearing – indeed, as the facts of this case indicate, the Board would be within its discretion to say next to nothing.[7] Nor is the Board required to have any sort of hearing on this question, much less the "full hearing" required by the California statute approved by the Supreme Court in *Morales*.

Unlike the California provision at issue in *Morales*, which established an annual hearing as a default but conferred on the Board of Prison Terms the authority to "defer the next hearing up to two years more depending on the circumstances," the Georgia regulation simply sets the default for affected inmates at reconsideration "at least every eight years." Eight years is a long time. Much can happen in the course of eight years to affect the determination that an inmate would be suitable for parole. The *Morales* Court emphasized that, because an

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[7] The letter Jones received from the Board in 1995 illustrates the minimal burden the regulation places on the Board to justify its scheduling decisions. In its entirety, this letter reads:

> Dear Mr. Jones,
>
> You have been thoroughly and carefully considered for parole. The Board's decision is to deny parole at this time. The main reasons for the decision cited by the Board members during their individual study of your case are circumstances and nature of the offense, and multiple offenses.
>
> The Board has decided to consider you again for parole during August 2003.
>
> Sincerely,
> [signature].

R.1-18-Ex.3

inmate's "parole release date [often] comes at least several years after a finding of suitability," and because the Board "retains the discretion to expedite the release date of such a prisoner," a prisoner affected by the amended California statute who can demonstrate "that he was 'suitable' for parole two years prior to such a finding by the Board might well be entitled to secure a[n earlier] release date that reflects that fact." *Morales*, 514 U.S. at 513. The eight-year period specified in r. 475-3-.05.(2), however, is simply too long to allow us to say that an inmate who would have been able to demonstrate suitability for parole in the years between reconsideration hearings would be able to "cure" this delay through petitioning for an earlier release date. There is therefore a "sufficient risk" that the amended Georgia regulation would "increas[e] the measure of punishment attached to the covered crimes." *Id.* at 509.

We are not persuaded by the Board's argument that the policy statement it issued in October 1996 cures the constitutional defects of r. 475-3-.05.(2) identified here. *See* State Board of Pardons and Paroles Policy Statement No. 4.110. The relevant language of the policy statement provides that

> *Policy*: It is the policy of the Board that all Life Sentence Cases denied parole may be set for reconsideration up to a maximum of eight years from the date of the last denial when, in the Board's determination, it is not reasonable to expect that parole would be granted during the intervening years. Inmates set-off under this policy may receive expedited parole reviews in the event of a change in their circumstance or

> where the Board receives new information that would warrant a sooner review.
>
> *Procedures*: At the time the Members vote to deny parole in a Life Sentence Case, the Members will indicate the number of years the inmate must serve prior to being next considered.

See id. §§ 1.105-06.

This policy does not sufficiently mitigate the defects in the regulation itself to defeat an ex post facto challenge. Policy statements, unlike regulations, are unenforceable and easily changed, and adherence to them is a matter of the Board's discretion. These are qualities that caution against treating their contents as if they had the authority of officially promulgated statutes or regulations. Moreover, even notwithstanding these limitations, this particular policy statement still does not require the Board to make particularized findings or even to provide clear reasons for its decision regarding the scheduling of subsequent hearings. And it also, of course, continues to allow an interval of eight years between hearings without any requirement that the Board consider an inmate's case during that time. Given the large class of affected inmates, this eight-year interval seems certain to ensure that some number of inmates will find the length of their incarceration extended in violation of the Ex Post Facto Clause of the Constitution.

The Board also argues that we should follow the Fourth Circuit, which in the wake of *Morales* upheld against ex post facto challenges the retroactive application of both South Carolina's and Virginia's amended parole reconsideration statutes. *See Roller v. Gunn*, 107

F.3d 227 (4th Cir. 1997) (South Carolina); *Hill v. Jackson*, 64 F.3d 163, 169-70 (4th Cir. 1995) (Virginia). We do not find in these cases, however, any discussion or analysis of the absence in the statutes at issue of the procedural safeguards deemed essential in *Morales* to protect inmates against an increase in the "quantum of punishment" attached to their crimes. *See Roller*, 107 F.3d at 238-40 (dissent of Judge Hall). Moreover, the South Carolina statute as amended provides that affected inmates "only have [their] case[s] reviewed every two years after an initial negative parole determination rather than every year," *Roller*, 107 F.3d at 229 (citing S.C. CODE ANN. § 24-21-645 (Law. Co-op. 1997)), while the Virginia amendments authorize the extension of the period between parole reconsiderations from one year to three years. *Hill*, 64 F.3d at 166 (citing VA. CODE ANN. § 53.1-154 (Michie 1988)). The respective time-frames created for the subsequent parole reconsideration of inmates by the South Carolina and Virginia statutes are thus considerably shorter than the lengthy eight-year gap between parole reconsiderations authorized by the Georgia provision, thus creating less of a risk than the Georgia statute that "the measure of punishment" imposed on affected inmates will be "increased." *Morales*, 514 U.S. at 513.

Whether a particular provision violates the prohibition on ex post facto laws is a "matter of 'degree.'" *Morales*, 514 U.S. at 509 (quoting *Beazell*, 269 U.S. at 171). Given the length of time that the Georgia provision requires inmates to wait between parole consideration hearings and the absence of safeguards such as a "full hearing and review of all the relevant facts" and an obligation on the part of the Board to state particularized

facts relating to the inmate's likely future parole eligibility, we cannot conclude – as we must, to find no ex post facto violation – that the amended regulation "ha[s] neither the purpose nor the effect of increasing the quantum of punishment." *Lynce*, 117 S.Ct. at 897.

For the foregoing reasons, we conclude that *Akins* has not been overruled. Indeed, we find that the Supreme Court's reasoning in *Morales* and *Lynce* reaffirms the correctness of our holding in that case. Thus, pursuant to *Morales*, *Lynce*, and *Akins*, we REVERSE the district court's grant of the defendant's motion for summary judgment on the plaintiff's ex post facto claim, and REMAND the case to the district court for proceedings consistent herewith.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT L. JONES,	:	
Plaintiff,	:	
-v-	:	1:95-CV-3012-CAM
J. WAYNE GARNER, Chairman, Georgia State Board of Pardons and Paroles,	:	
Defendant.	:	

ORDER

(Filed Aug. 25, 1997)

Plaintiff Robert L. Jones, acting *pro se*, filed this case pursuant to 42 U.S.C. § 1983, alleging various violations of his constitutional rights. Following this Court's dismissal of the case as frivolous, Jones appealed. The United States Court of Appeals for the Eleventh Circuit affirmed dismissal as to Jones' due process, equal protection, and retaliation claims, but reversed as to his *ex post facto* claim, finding that the claim was "not necessarily frivolous" due to the holding in *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995). The case was reopened, and all parties were served. The case is before the Court on Defendants' motion for summary judgment, Jones' motion for summary judgment, Defendants' motion to compel answers to mandatory interrogatories, and Jones' motions for production of documents and appointment of counsel. For the reasons stated herein,

Defendants' motion for summary judgment is granted, and all other motions are denied.

BACKGROUND

The facts in this case are not in dispute. In July 1974 Jones was sentenced to life in prison following conviction in the Superior Court of Fulton County on a murder charge. He escaped in November 1979. In August 1982, he was again sentenced to life in prison following conviction in the Superior Court of Fulton County on a second murder charge.

The rules and regulations which were in effect at the time of Jones' second offense required that he be initially considered for parole after seven years and that he be reconsidered every three years. Prior to the time he was initially considered for parole, the rules were amended to require reconsideration "at least every eight years."

Jones was initially considered for parole in 1989, seven years after his conviction. The Board of Pardons and Paroles (Board) denied parole because of Jones' multiple offenses, and he was scheduled for reconsideration in 1997 (eight years). Because of the intervening decision in *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991), Jones was actually reconsidered for parole in 1992 (three years). He was again denied parole, both because of his multiple offenses and because of the "circumstances and nature of the offense," and was scheduled for reconsideration in 1995. He was reconsidered in 1995 and, for a third time, denied parole, again because of his multiple offenses and because of the "circumstances and nature of the offense." Because of the

intervening decision in *Morales*, the amended regulation was applied, and Jones was scheduled for reconsideration in 2003 (eight years).

Jones contends that applying the amended regulation to him so that he will not be reconsidered for parole for eight years violates his rights under the *ex post facto* clause of the United States Constitution.

LEGAL STANDARDS AND ANALYSIS

Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The parties agree that there are no genuine issues of material fact, and both parties have moved for summary judgment. At issue is whether the Supreme Court decision in *Morales* overruled the decision of the Court of Appeals in *Akins*. Jones relies upon *Akins* in support of his position that reducing the frequency of his parole reconsideration hearings violates his rights under the *ex post facto* clause. Defendants rely upon *Morales* in support of their position that increasing the number of years permitted between parole reconsideration hearings for inmates serving life sentences does not violate the *ex post facto* clause. Although one panel of the Court of Appeals suggested that "[i]n light of *Morales*, the continuing validity of *Akins* is questionable," *Jones v. Georgia State Bd. of Pardons and Paroles*, 59 F.3d 1145, 1149 n. 8 (11th Cir. 1995), the Court of Appeals, in reversing this Court's dismissal of the case as frivolous, indicated that *Morales* does "not necessarily" overrule *Akins*.

In *Akins*, the Court of Appeals held that reducing the frequency of parole reconsideration hearings could "as a matter of law violate the *ex post facto* clause." *Akins*, 922 F.2d at 1565. The Court of Appeals further held that the actions of the Board in retroactively applying the changes and denying annual reconsideration hearings to the plaintiffs did violate their rights under the *ex post facto* clause. *Id.* Before reaching its decision, the Court of Appeals determined that: (1) the rules and regulations promulgated by the Board pursuant to authority delegated by the Georgia legislature "to enact rules and regulations concerning parole reconsideration" were "laws" within the meaning of the *ex post facto* clause, *id.* at 1561 (citing O.C.G.A. § 42-9-45 (1989)); (2) parole reconsideration hearings were a part of parole eligibility because "an inmate is effectively ineligible for parole between two parole reconsideration hearings," *id.* at 1562 (emphasis in original); and (3) the *ex post facto* clause's restrictions applied to a change in parole eligibility because parole eligibility is part of the sentence imposed as punishment for a crime, *id.* at 1563. The Court of Appeals then applied the two-prong analysis developed by the Supreme Court, *id.* (citing *Weaver v. Graham*, 450 U.S. 24 (1981)), determining (1) that the Board's actions were "retrospective" because "the Board effectively altered the consequences of [the plaintiffs'] crimes after they were completed," *id.* at 1563-64, and (2) that the amendments "disadvantage[d] the [plaintiffs]" because the change, by increasing the time between two reconsideration hearings, "increased the time an inmate must spend in prison before he can again become eligible for parole," *id.* at 1564. In *Morales*, the Supreme Court held that California did not violate

the *ex post facto* clause by applying an amendment which decreased the frequency of parole suitability hearings to prisoners who committed their crimes before the amendment was enacted. *Morales*, 514 U.S. 499, 501-02 (1995). The Court, however, specifically "express[ed] no view as to the constitutionality of any of a number of other statutes that might alter the timing of parole hearings under circumstances different from those present here." *Id.* at 509 n.5.

California changed its parole procedures from requiring annual parole reconsideration hearings to permitting the Board of Prison Terms to defer hearings for up to three years "if the prisoner has been convicted of 'more than one offense which involves the taking of a life' and if the Board 'finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.' " *Id.* at 503. As had the Eleventh Circuit in *Akins*, the Ninth Circuit held that reducing the frequency of reconsideration hearings violated the *ex post facto* clause because having parole hearings less often effectively increased the prisoner's sentence since the prisoner could not be paroled without first having a hearing. *Id.* at 504. The Supreme Court found that the amendment at issue did not change the prisoner's sentencing range, did not change "the substantive formula for securing any reductions to this sentencing range," and did not change "the standards for fixing a prisoner's initial date of eligibility for parole or for determining his suitability for parole and setting his release date." *Id.* at 507 (citations omitted). The amendment at issue made only one change: "It introduced the possibility that after the initial parole hearing, the Board

would not have to hold another hearing the very next year, or the year after that, if it found no reasonable probability that [the prisoner] would be deemed suitable for parole in the interim period." *Id.* The change merely relieved the Board of the necessity of holding parole hearings for prisoners who had no reasonable chance of being released. *Id.*

The Court emphasized that determining whether a change implicates the *ex post facto* clause is a matter of degree – "whether [the change] produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 509. The Court found that the California amendment created "only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment." *Id.* Although the Court declined to establish a formula for determining when a change implicates the *ex post facto* clause, it found the following factors significant in reaching the *Morales* decision: (1) "the amendment applie[d] only to a class of prisoners for whom the likelihood of release on parole [was] quite remote," *id.* at 510; (2) "[t]he amendment [had] no effect on the date of any prisoner's initial parole suitability hearing [as] it affect[ed] the timing only of *subsequent* hearings," *id.* at 511 (emphasis in original); (3) "the Board retain[ed] the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner," *id.*; (4) the possibility existed for an expedited hearing where a change in circumstances altered the prisoner's suitability for parole, *id.* at 512-13; and (5) "the practical effect of a hearing postponement [was] not significant"

since the actual release date was frequently several years after a finding of suitability for parole, *id.* at 513.

The *Morales* decision supports the preliminary holding in *Akins* that the rules and regulations concerning parole reconsideration are "laws" within the meaning of the *ex post facto* clause, that parole reconsideration hearings are a part of parole eligibility, and that the *ex post facto* clause's restrictions apply to a change in parole eligibility. As was the case in *Akins*, applying the amended regulation so that Jones will be reconsidered for parole only after eight years is a retrospective application. This Court must determine whether, in light of *Morales*, the amendments disadvantage Jones by increasing the time between hearings.

The Georgia Administrative Code currently requires that "inmates serving life sentences who have been denied parole" be given reconsideration hearings "at least every eight years." Ga. Comp. R. & Regs. 475-3-.05(2). The Board's policy statement specifies that

> all Life Sentence Cases denied parole may be set for reconsideration up to a maximum of eight years from the date of last denial when, in the Board's determination, it is not reasonable to expect that parole would be granted during the intervening years. Inmates set-off under this policy may receive expedited parole reviews in the event of a change in their circumstance or where the Board receives new information that would warrant a sooner review.

State Board of Pardons and Paroles Policy Statement No. 4.110.

Here, as in *Morales*, the amendment of which Jones complains changes only the timing between reconsideration hearings, relieving the Board of the necessity of holding parole hearings for prisoners who have no reasonable chance of being released. It does not change any prisoner's sentencing range, the substantive formula for evaluating a prisoner for release, or the standards for setting a prisoner's initial date of eligibility for parole. The change applies only to prisoners serving life sentences who have been denied parole at least once, "a class of prisoners for whom the likelihood of release on parole is quite remote," *Morales*, 514 U.S. at 510; it affects only the timing of reconsideration hearings; the Board retains the authority to set subsequent hearings at a time suitable to the "particular circumstances of the individual prisoner," *id.* at 511; the Board's policies specifically provide for an expedited reconsideration hearing if a prisoner's circumstances change or if the Board receives new information that might affect a prisoner's chance of parole.

The Court finds that, as in *Morales*, the change to which Jones objects creates "only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment." *Id.* at 509. It does not disadvantage Jones and therefore does not violate his rights under the *ex post facto* clause.

CONCLUSION

The Court GRANTS Defendants' motion for summary judgment, DENIES Jones' motion for summary judgment, and DENIES all other outstanding motions as moot.

Clerk of Court is directed to enter judgment in favor of Defendants. This closes the case.

SO ORDERED, this 25 day of August, 1997.

/s/ Charles A. Moye, Jr.
UNITED STATES
DISTRICT JUDGE
CHARLES A. MOYE, JR.

CAM:J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT L. JONES,	.	CIVIL ACTION FILE
Plaintiff,	.	NO. 1:95-cv-3012-CAM
	.	
vs.	.	
J. WAYNE GARNER, et al.,	.	
	.	
Defendant.	.	

JUDGMENT

This action having come before the court, Honorable Charles A. Moye, Jr., United States District Judge, for consideration of defendants' motion for summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is **dismissed**.

Dated at Atlanta, Georgia, this 25th day of August, 1997.

LUTHER D. THOMAS
CLERK OF COURT

By: /s/ Joyce White
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
August 26, 1997
Luther D. Thomas
Clerk of Court

By: /s/ Joyce White
Deputy Clerk

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-9009

ROBERT L. JONES,

Plaintiff-Appellant,

versus

J. WAYNE GARNER, Employed as Chairman, State Board of Pardons and Paroles, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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(Filed Apr. 19, 1999)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: BIRCH and BARKETT, Circuit Judges, and HANCOCK*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled

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* Honorable James H. Hancock, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
AUG 19 1999
CLERK

No. 99-137

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

J. WAYNE GARNER, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, JAMES T. MORRIS, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, GARFIELD HAMMONDS, JR., former Chairman of the State Board of Pardons and Paroles of the State of Georgia, BOBBY K. WHITWORTH, Member of the State Board of Pardons and Paroles of the State of Georgia, and TIMOTHY E. JONES, former Member of the State Board of Pardons and Paroles of the State of Georgia,

Petitioners,

v.

ROBERT L. JONES

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S MOTION TO PROCEED *IN FORMA PAUPERIS*

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Counsel of Record for Respondent

19 pp

RESPONDENT'S MOTION TO PROCEED *IN FORMA PAUPERIS*

NOW COMES Respondent, Robert L. Jones, and pursuant to Supreme Court Rule 39, files this motion to proceed *in forma pauperis*. Respondent, an inmate at Hays State Prison in Trion, Georgia, sought leave to proceed *in forma pauperis* in this action in the United States District Court for the Northern District of Georgia. Respondent's request was granted by the District Court in an order dated November 17, 1995. Jones continued to proceed *in forma pauperis* through his appeal to the United States Court of Appeals for the Eleventh Circuit. On both occasions the motions to proceed *in forma pauperis* were granted.

Counsel for Respondent, Elizabeth T. Kertscher (f/k/a Elizabeth B. Thompson) was appointed as counsel for Respondent by Judge Edmondson of the United States Court of Appeals for the Eleventh Circuit pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. Supreme Court Rule 9 allows an attorney to file documents in the Supreme Court in a representative capacity without first being admitted to the Court's Bar, if the attorney is appointed under the Criminal Justice Act. Further, Supreme Court Rule 39 provides that no declaration or affidavit of indigency in support of this motion is required where the United States Court of Appeals has appointed counsel under the Criminal Justice Act.

Respondent respectfully requests that this Court grant his motion to proceed *in forma pauperis* and to allow counsel to file this motion and the accompanying Brief in Opposition to Petition for Writ of Certiorari based on her appointment under the Criminal Justice Act.

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Supreme Court, U.S.
FILED
AUG 19 1999
CLERK

No. 99-137

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

J. WAYNE GARNER, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, JAMES T. MORRIS, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, GARFIELD HAMMONDS, JR., former Chairman of the State Board of Pardons and Paroles of the State of Georgia, BOBBY K. WHITWORTH, Member of the State Board of Pardons and Paroles of the State of Georgia, and TIMOTHY E. JONES, former Member of the State Board of Pardons and Paroles of the State of Georgia,

Petitioners,

v.

ROBERT L. JONES

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Counsel of Record for Respondent

QUESTIONS PRESENTED

1.

Whether the ex post facto clause of the United States Constitution bars the State of Georgia from applying its amended parole regulations to inmates whose crimes predated the amendment, where the amendment increases the time between life-sentenced inmates' parole reconsideration from three to eight years, or whether the change creates only "the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment."

2.

Whether the decision of the United States Court of Appeals for the Eleventh Circuit conflicts with the decisions of other United States Courts of Appeals and the appellate courts of the several states as to the meaning and import of this Court's decisions in *California Dep't of Corrections v. Morales* and *Lynce v. Mathis*.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the Court of Appeals and in the District Court were as listed in the caption. For the purposes of Respondent's claims for declaratory and injunctive relief, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Petitioners are Walter S. Ray, Chairman, Bobby K. Whitworth, Garfield Hammonds, Jr., Dr. Betty Ann Cook, and Dr. Eugene P. Walker, the current members of the Board.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT 2

ARGUMENT 4

I. STANDARDS FOR GRANTING A PETITION FOR WRIT OF CERTIORARI 4

II. THE ELEVENTH CIRCUIT PROPERLY APPLIED THE BURDEN OF PROOF IN EVALUATING THE CONSTITUTIONALITY OF GEORGIA'S AMENDED PAROLE BOARD REGULATIONS 5

III. THE ELEVENTH CIRCUIT'S OPINION IN JONES V. GARNER IS NOT IN CONFLICT WITH PRECEDENTS OF THIS COURT, OTHER COURTS OF APPEALS, AND THE APPELLATE COURTS OF THE SEVERAL STATES 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Akins v. Snow, 922 F.2d 1558 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991) 3, 4

Allison v. Kyle, 66 F.3d 71, 74-75 (5th Cir. 1995) 7

California Dep't of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995) 3, 4, 5, 6, 7, 8, 9

Fletcher v. Williams, 179 Ill. 2d 225, 688 N.E. 2d 635 (1997). 7

Furnari v. Zavaras, 914 P.2d 508 (Colo. App. 1996) 7

Hamm v. Latessa, 72 F.3d 947 (1st Cir. 1995), *cert. denied*, 519 U.S. 836 (1996) 7

Hill v. Jackson, 64 F.3d 163 (4th Cir. 1995) 7

Jones v. Garner, 164 F.3d 589 (11th Cir. 1999) 1

Jordan v. Tennessee Board of Paroles, 1997 Tenn. App. LEXIS 27 (Tenn. App. January 15, 1997) 8

Lindsey v. Washington, 301 U.S. 397 (1937) 6

Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997) 5, 6, 7

Phelps v. Traugher, 1996 U.S. App. LEXIS 8009 (6th Cir. Tenn. Mar. 20, 1996) 7

Roller v. Gunn, 107 F.3d 227, 234-37 (4th Cir.), *cert. denied*, 522 U.S. 874 (1997) 7

Shabazz v. Gabry, 123 F.3d 909, 913-916 (6th Cir.), *cert. denied*, 522 U.S. 1019 (1997) .. 7

Tuff v. State, 732 So.2d 461 (Fla. 3rd DCA 1999) 9

Statutes

Ga. Admin. Comp. Ch. 475-03-.05(2) 2, 5

U.S. Const. Art. I, § 10 1

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. A) is reported as *Jones v. Garner*, 164 F.3d 589 (11th Cir. 1999). The order on the merits by the United States District Court for the Northern District of Georgia (Pet. App. B) is No. 1:95-cv-3012-CAM (August 25, 1997).

JURISDICTION

The court of appeals entered its opinion and judgment on January 6, 1999 and entered its denial of Petitioners' Motion For Rehearing and Suggestion of Rehearing En Banc on April 19, 1999. The petition for a writ of certiorari was docketed on July 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 10:

> No State shall . . . pass any . . . ex post facto Law . . . .

STATEMENT

On July 23, 1974, Respondent Robert L. Jones was sentenced to life imprisonment following his conviction for murder in the Superior Court of Fulton County, Georgia. Respondent was convicted a second time and again sentenced to life imprisonment in the Superior Court of Fulton County on August 20, 1982.

At the time of Mr. Jones' last conviction in 1982, Georgia's Parole Board regulations required that all life sentence inmates be first considered for parole after serving seven year's imprisonment, and for those inmates denied parole, the regulations provided for reconsideration of these inmates no less than every three years.

In 1985, three years after Mr. Jones' conviction, the Board amended its regulations to provide for parole reconsideration only one every eight years. The amended provision reads:

> Reconsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possibly discouraging diagnostic opinions.

Ga. Admin. Comp. Ch. 475-03-.05(2).

Georgia's parole regulations do not require a hearing in connection with the parole reconsideration process. Parole board members decide an inmate's eligibility solely upon the contents of the inmate's file. Georgia's amended regulations do not require the parole board to make specific inquiries or findings of fact regarding an inmate's parole eligibility before deferring an inmate's next reconsideration for an eight year period.

Respondent Jones was initially considered for parole in 1989 after his first seven years in prison, as required by the regulations that were in place at the time his offense was committed. However, based on the 1985 amendment to the Parole Board regulations, after denying Jones' parole in 1989, the Board informed him that his next consideration would occur in 1997 (eight years later), rather than three years from the date of his first denial, as provided by the earlier rules.

However, in the interim, the Eleventh Circuit Court of Appeals decided the case of *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991). The Eleventh Circuit held that the Constitution's ex post facto clause prohibited the Parole Board from applying the new regulations to inmates whose offenses pre-dated the amendment. Accordingly, the Parole Board rescheduled Jones' parole reconsideration date and thereafter reconsidered Jones for parole at three-year intervals, in 1992 and again in 1995.

After Jones' 1995 reconsideration, this Court decided the case of *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995). The Parole Board interpreted *Morales* as implicitly overruling the Eleventh Circuit's decision in *Akins v. Snow*, *supra*. Accordingly, the Board scheduled Jones and other similarly situated inmates for reconsideration in the year 2003 (eight years later).

Jones filed suit pursuant to 42 U.S.C. §1983, contending that retroactive application of the amended Parole Board regulations violated the ex post facto laws of the United States Constitution by deferring his parole reconsideration for a period of five years longer than the earlier regulations would have allowed. The United States District Court for the Northern District of Georgia granted summary judgment in favor of

Petitioners. However, the Eleventh Circuit Court of Appeals reversed, holding that *Morales* did not implicitly overrule its decision in *Akins v. Snow* because of the factual differences between the California regulations at issue in *Morales* and the Georgia rules.

ARGUMENT

I. STANDARDS FOR GRANTING A PETITION FOR WRIT OF CERTIORARI.

A petition for a writ of certiorari will be granted only for compelling reasons. Supreme Court Rule 10 outlines an illustrative list of reasons the Court believes are compelling. These include conflicts between circuit courts or state supreme courts, conflicts between lower courts and the Supreme Court, and important questions of federal law that the Supreme Court has yet to address. Sup. Ct. R. 10. Petitions for writs of certiorari are rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly state rule of law. *Id.*

Petitioners' request for a writ of certiorari fails to show any compelling reason why the Supreme Court should address this case. This Court clearly set out the standards to be followed in addressing the issue presented in this case in *Morales*. The Eleventh Circuit Court of Appeals simply recognized factual distinctions between the regulations challenged in *Morales* from the ones employed by the Georgia Parole Board. The Eleventh Circuit's decision was made within the framework of *Morales* and without creating any conflict. Although other courts have reached different results, each of those cases addressed different factual situations which, like *Morales*, are distinguishable from the rules analyzed by the Eleventh Circuit in this case. Therefore, there is no compelling reason for this Court to revisit the Eleventh Circuit's decision in this case.

II. THE ELEVENTH CIRCUIT PROPERLY APPLIED THE BURDEN OF PROOF IN EVALUATING THE CONSTITUTIONALITY OF GEORGIA'S AMENDED PAROLE BOARD REGULATIONS.

Petitioners contend that the Eleventh Circuit Court of Appeals placed upon Petitioners the burden of showing that the application of Ga. Admin. Comp. Ch. 473-03-.05(2) would not pose a risk of increasing Jones' sentence. In support of this proposition, Petitioners misstate the proper burden to be applied in evaluating this case, and misstate the Eleventh Circuit's opinion in describing the burden that was applied in this case.

Petitioner contends that in any ex post facto inquiry, the burden is on the prisoner to demonstrate that the law in question will, as applied to his particular case, violate the ex post facto clause. Petitioner cites this Court's decision in *Lynce v. Mathis*, 519 U.S. 433 (1997) in support of this proposition. Petitioner interprets *Lynce* as requiring that Jones demonstrate that he would have received parole under the old system before a finding of an ex post facto violation could be made. This is simply incorrect.

This Court's decisions in *Lynce v. Mathis* and *California Dep't of Corrections v. Morales* specifically did not require such showing from the prisoners that contested their states' changes in parole review regulations. In *Morales*, this Court stated "in evaluating the Constitutionality of the 1981 amendment, we must determine whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." 514 U.S. at 509. The Court specifically did not require the particular inmate to show that he would have been granted parole under the old system but not the new, saying "we have previously declined to articulate a simple 'formula' for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the Constitutional prohibition... ." *Id.* In fact, the Court specifically indicated, "we have

held that a party asserting an ex post facto claim need not carry the burden of showing that he would have been sentenced to a lesser term under the measure or range of punishments in place under the previous statutory scheme... ." (citing *Lindsey v. Washington*, 301 U.S. 397 (1937)). Instead, the challenging party must establish that the measure of punishment itself has changed. *Id.* An inmate may satisfy this burden by pointing to objective considerations that support the conclusion that the amended rules may change the "quantum of punishment." *Morales*, 514 U.S. at 506; *Lynce*, 117 S.Ct. at 896. The proper inquiry is whether there is any reason "to conclude that the amendment will have any effect on any prisoner's actual term of confinement." *Lynce*, 117 S.Ct. at 896; *Morales*, 514 U.S. at 512.

The burden of proof set forth in *Lynce* and *Morales* is precisely the standard applied by the Eleventh Circuit Court of Appeals in the case below. *See*, e.g., 164 F.3d 589, 591-592 ("[*Morales*] directed that each case be analyzed by asking 'whether [the law at issue] produces a sufficient risk of increasing the measure of punishment attached to the covered crimes'..."). Nothing in the Eleventh Circuit's opinion supports the inference drawn by Petitioner that the Eleventh Circuit placed any burden of proof on Petitioner that should have been placed on the Respondent; instead, the Court merely analyzed the largely undisputed facts within the framework articulated by this Court in *Morales*, and determined that the facts, as presented by Respondent, indicated a sufficient risk that the amended Parole Board regulations had the purpose or effect of increasing the quantum of punishment.

III. THE ELEVENTH CIRCUIT'S OPINION IN *JONES V. GARNER* IS NOT IN CONFLICT WITH PRECEDENTS OF THIS COURT, OTHER COURTS OF APPEALS, AND THE APPELLATE COURTS OF THE SEVERAL STATES.

Petitioner contends that the Eleventh Circuit's decision in *Jones* is in conflict with the decisions of this Court in *Morales* and *Lynce*, and decisions of the First[1], Fourth[2], Fifth[3], and Sixth[4] Circuits, as well as state appellate courts in Colorado[5], Florida[6], Illinois[7], and Tennessee[8], each of which have rejected ex post facto challenges to various parole procedures. Petitioner characterized these decisions as conflicting with the holding in *Jones v. Garner* and creating a split in the circuit courts and state appellate courts on the issue presented herein. However, a review of these cases shows that there is no conflict in the application of laws or in the interpretation of this Court's precedent regarding the interpretation of ex post facto challenges to parole regulations. Instead, Georgia's parole board took a unique step in tacking on an additional five years to inmates' sentences through a retroactive rule amendment, a situation that is factually distinct from any case cited by Petitioner. The Eleventh Circuit's decision in *Jones* therefore does not conflict with either the precedents of this Court or those of other state and federal courts. None of the cases cited from other circuits or states involve the type of parole reconsideration scheme set forth in *Jones*.

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[1] *Hamm v. Latessa*, 72 F.3d 947, 957-59 (1st Cir. 1995), *cert. denied*, 519 U.S. 836 (1996).
[2] *Roller v. Gunn*, 107 F.3d 227, 234-37 (4th Cir.), *cert. denied*, 522 U.S. 874 (1997); *Hill v. Jackson*, 64 F.3d 163, 167-71 (4th Cir. 1995).
[3] *Allison v. Kyle*, 66 F.3d 71, 74-75 (5th Cir. 1995).
[4] *Shabazz v. Gabry*, 123 F.3d 909, 913-916 (6th Cir.), *cert. denied*, 522 U.S. 1019 (1997); *Phelps v. Traugher*, 1996 U.S. App. LEXIS 8009 (6th Cir. Tenn. Mar. 20, 1996).
[5] *Furnari v. Zavaras*, 914 P.2d 508, 509-11 (Colo. App. 1996).
[6] *Tuff v. State*, 1999 Fla. App. LEXIS 6424 (Fla. App. May 19, 1999).
[7] *Fletcher v. Williams*, 179 Ill. 2d 225, 235-36, 688 N.E. 2d 635, 641-42 (1997).
[8] *Jordan v. Tennessee Board of Paroles*, 1997 Tenn. App. LEXIS 27 (Tenn. App. January 15, 1997).

As this Court pointed out in *Morales*, the determination of whether a particular parole reconsideration scheme will violate the ex post facto clause is highly dependent on the particular facts and circumstances presented by each case. The Eleventh Circuit in *Jones* carefully distinguished the factual circumstances presented by *Morales* from those presented in the instant case. The Eleventh Circuit found that there were significant differences between the California regulations considered in *Morales* and those at issue in *Jones*. First, the California regulations applied to a much narrower class of inmates (those convicted for an offense involving the taking of a life); the Georgia regulations applied to all life sentence inmates, a broad class of prisoners that the Eleventh Circuit found consisted of "many inmates who can expect at some point to be paroled." Second, the California regulations required that the California Board of Prison Terms conduct a "full hearing and review" and make specific findings that it would not be reasonable to expect that parole would be granted during the following two years; the Georgia regulations do not require a full hearing or any particularized findings supporting its conclusion that parole would not be granting during the intervening eight years. Finally, the California regulations in *Morales* provided a means for correcting any effort in deferring an inmate's review through advancing the prisoner's actual release date; Georgia's parole procedures do not provide the Board with such a means of ensuring that a prisoner that is wrongfully deferred will not spend more time in jail as a result.

The cases from other circuits and jurisdictions cited by Petitioner each analyze the particular facts and circumstances presented by their respective parole procedures, finding that the proposed changes do not create a significant risk of increased punishment. Not one deals with a regulation that allows a parole board to defer an

inmate's parole reconsideration for eight years without procedural safeguards. In fact, the most severe of the changes to a parole reconsideration procedure in the cases cited by Petitioner provided for a maximum deferral of five years (a deferral of three years from what would have been required under the previous procedure), with procedural safeguards not present under the Georgia rules. *Tuff v. State*, 732 So.2d 461 (Fla. 3rd DCA 1999). In contrast, Georgia's rules added an additional five years to an inmate's time between considerations (for a total of eight years) without any significant safeguards.

The Eleventh Circuit's analysis of Georgia's regulations followed this Court's analysis in *Morales* to the letter. The Eleventh Circuit simply found that the facts and circumstances presented by the particular amendments at issue here required a different result than the California rules analyzed by this Court in *Morales*. No significant conflict between circuits is presented by this decision, and certiorari should not be granted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 99-137

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

J. WAYNE GARNER, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, JAMES T. MORRIS, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, GARFIELD HAMMONDS, JR., former Chairman of the State Board of Pardons and Paroles of the State of Georgia, BOBBY K. WHITWORTH, Member of the State Board of Pardons and Paroles of the State of Georgia, and TIMOTHY E. JONES, former Member of the State Board of Pardons and Paroles of the State of Georgia,

Petitioners,

v.

ROBERT L. JONES

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

CERTIFICATE OF SERVICE

This is to certify that I have this day served the appropriate parties in the foregoing matter a copy of **RESPONDENT'S MOTION TO PROCEED *IN FORMA PAUPERIS*** and **BRIEF FOR THE RESPONDENT IN OPPOSITION** as follows:

United States Postal Service
Neal B. Childers
Senior Assistant Attorney General
40 Capital Square, S.W.
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This 18th day of August, 1999.

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No. 99-137

Supreme Court, U.S.
FILED
NOV 12 1999
OFFICE OF THE CLERK

In The

Supreme Court of the United States

J. WAYNE GARNER, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, JAMES T. MORRIS, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, GARFIELD HAMMONDS, JR., former Chairman of the State Board of Pardons and Paroles of the State of Georgia, BOBBY K. WHITWORTH, Member of the State Board of Pardons and Paroles of the State of Georgia, and TIMOTHY E. JONES, former Member of the State Board of Pardons and Paroles of the State of Georgia,

Petitioners,

v.

ROBERT L. JONES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Certiorari Granted September 28, 1999

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92 pp

JOINT APPENDIX
TABLE OF CONTENTS

- Docket Entries: *Jones v. Garner, et al.*, No. 95-CV-3012 (N.D. Ga) 1
- Complaint (R1)[1], filed November 15, 1995 16
- Answer (R16), filed May 15, 1997 29
- Defendants' Motion for Summary Judgment with Brief in Support (R18), filed May 27, 1997 34
- Plaintiff's Brief in Support of Motion for Summary Judgment (R19), filed May 29, 1997 58
- Defendants' Response to Plaintiff's Motion for Summary Judgment (R21), filed June 13, 1997 71
- Plaintiff's Response to Defendants' Motion for Summary Judgment (R26), filed July 10, 1997 79
- Order of the United States District Court granting Defendant's Motion for Summary Judgment and denying all other outstanding motions as moot (R34), filed August 25, 1997 ..... Pet. App. 20a
- Decision of the United States Court of Appeals for the Eleventh Circuit, Case No. 97-9009, reversing the district court's grant of Defendants' Motion for Summary Judgment on Plaintiff's ex post facto claim, filed January 6, 1999 ..... Pet. App. 1a
- Order of the United States Court of Appeals for the Eleventh Circuit denying Defendants' Petition for Rehearing and Suggestion of Rehearing En Banc, filed April 19, 1999 ..... Pet. App. 30a
- Rule 475-3-.05 of the State of Georgia Board of Pardons and Paroles, revised December 1, 1979 ... 116
- Rule 475-3-.05 of the State of Georgia Board of Pardons and Paroles, revised April 10, 1995 118

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[1] References to the District Court record docket entries are denoted as (R#).

Docket Entries

U.S. District Court

U.S. District Court for the
Northern District of Georgia (Atlanta)

11/21/95	1	COMPLAINT, with request to proceed in forma pauperis with ORDER by Mag Judge Richard H. Deane, Jr. GRANTING request. Service of process shall not issue at present time. (File forwarded to staff law clerk.) cc (jaw) [Entry date 11/28/95]
11/21/95	2	ORDER to proceed in forma pauperis by Mag Judge Richard H. Deane, Jr. cc (jaw) [Entry date 11/28/95]
12/26/95	3	ORDER dismissing complaint [1-1] pursuant to 28 U.S.C. 1915(d) by Judge Charles A. Moye, Jr. cc (jaw) [Entry date 12/29/95]
12/26/95	4	JUDGMENT ENTERED on in forma pauperis complaint [1-1] for dft against pla DISMISSING action pursuant to 28 USC 1915(d). cc (jaw) [Entry date 12/29/95]
1/12/96	5	NOTICE OF APPEAL from judgment [4-1], order dismissing complaint [1-1] pursuant to 28 U.S.C. 1915(d) [3-1], [3-2] by pla. FILING FEE $ NOT PAID (jaw) [Entry date 01/18/96]
1/18/96	–	SUBMITTED on notice of appeal for in forma pauperis determination [5-1] to Judge Charles A. Moye, Jr. (jaw) [Entry date 01/18/96]
1/18/96	–	Notice of appeal, certified copy of order 12/26/95, judgment of 12/26/95 and certified copy of docket to U.S. Court of

		Appeals RE: by Robert L. Jones for Court of Appeals appeal [5-1]. (jaw) [Entry date 01/18/96]
1/19/96	6	ORDER GRANTING pla's motion to appeal in forma pauperis [5-1], certificate of probable cause is DENIED by Judge Charles A. Moye, Jr. cc/cert cc to USCA (jaw) [Entry date 01/23/96] [Edit date 01/23/96]
1/31/96	–	Acknowledgment by Court of Appeals regarding appeal. USCA dkt no. 96-8078. (rag) [Entry date 02/01/96]
2/13/96	–	Request for Certificate of Readiness from Court of Appeals regarding appeal. USCA 96-8078. (rag) [Entry date 02/14/96]
2/14/96	–	CERTIFICATE OF READINESS OF RECORD ON APPEAL with certified copy of docket mailed to USCA. (1 Vol. of pleadings). USCA 96-8078. (rag)
2/23/96	–	USCA ack. receipt of COR. USCA 96-8078. (rag) [Entry date 02/26/96]
3/1/96	–	Request from USCA for Original Papers. Original papers mailed to USCA. (1 vol. of pleadings.) USCA 96-8078. (fbh) [Entry date 03/01/96]
3/11/96	–	USCA ack. receipt of original papers. USCA 96-8078. (rag) [Entry date 03/13/96] APPEAL
4/17/96	7	Certified copy of ORDER of the U.S. Court of Appeals DENYING appeal order [7-1] cc (jaw) [Entry date 04/25/96]

12/16/96	8	MOTION by plaintiff for appointment of counsel with brief in support. (jaw) [Entry date 01/07/97]
12/16/96	9	MOTION by plaintiff for evidentiary hearing. (jaw) [Entry date 01/07/97]
12/16/96	10	MOTION by plaintiff for leave to file discovery. (jaw) [Entry date 01/07/97]
12/26/96	11	Certified copy of JUDGMENT OF USCA AFFIRMING IN PART AND REVERSED IN PART judgment of this court. appeal USCA dkt. # 96-8078 (jaw) [Entry date 01/14/97]
12/26/96	11	Certified copy of JUDGMENT OF USCA REMANDED to the District Court for further action. judgment of this court. appeal USCA dkt. # 96-8078 (jaw) [Entry date 01/14/97]
1/8/97	–	SUBMITTED to Judge Charles A. Moye Jr. on [8-1] motion for appointment of counsel, [9-1] motion for evidentiary hearing, [10-1] motion for leave to file discovery (jaw) [Entry date 01/08/97]
1/14/97	–	SUBMITTED to Judge Charles A. Moye Jr. on [11-1] appeal judgment (jaw) [Entry date 01/14/97]
2/11/97	12	ORDER by Judge Charles A. Moye Jr., to reopen case and forward to Mag Judge Richard H. Deane, Jr. for further proceedings consistent with the opinion of the USCA for the 11th circuit, (cc) (jaw) [Entry date 02/13/97]
2/11/97	–	CASE REFERRED to Mag Judge Richard H. Deane Jr. (Calendar sheets forwarded) (jaw) [Entry date 02/13/97]

2/13/97	–	SUBMITTED to Mag. Judge Richard H. Deane Jr. on [8-1] motion for appointment of counsel, [9-1] motion for evidentiary hearing. [10-1] motion for leave to file discovery (jaw) [Entry date 02/13/97]
2/27/97	13	ORDER by Mag Judge Richard H. Deane Jr. ALLOWING CASE to proceed as any civil action and DIRECTING plaintiff to complete service forms and return to clerk within 30 days so that process may be served upon the dfts' by the U.S. Marshal Service (cc) (jaw) [Entry date 03/05/97]
3/12/97	14	Notice of request for 3 summons forms and 5 USM 285 marshalls forms by plaintiff. Mailed to pla this date (jaw) [Entry date 03/18/97] APPEAL
3/15/97	–	SUBMITTED to Judge Charles A. Moye Jr. on [8-1] motion for appointment of counsel, [9-1] motion for evidentiary hearing, [10-1] motion for leave to file discovery (jaw) [Entry date 03/15/97]
3/18/97	–	Rec'd one completed USM-285 form and 3 summons from pla. Mailed pla additional marshals forms and summons. Placed summons for James T. Morris & Timothy E. Jones in file pending receipt of completed USM-285 to be forwarded to U.S. Marshals for service (jaw) [Entry date 03/31/97]
3/18/97	–	Summons issued and USM285 prepared for service upon defendant J. Wayne Garner. Forwarded to USM with service copy of complaint, consent form to proceed

		before magistrate, and pretrial instructions. (jaw) [Entry date 03/31/97]
3/28/97	–	Rec'd completed usm285 marshals forms and summons from pla (jaw) [Entry date 04/07/97]
4/3/97	–	Completed referral to Mag Judge Richard H. Deane Jr. per David Powell, Law Clerk for RHD (jaw) [Entry date 04/03/97] [Edit date 04/03/97]
4/7/97	–	Summons issued and USM285 prepared for service upon James T. Morris, Timothy E. Jones, Garfield Hammonds, Jr., Bobby K. Whitworth, J. Wayne Garner. Forwarded to USM with service copy of complaint, consent form to proceed before magistrate, and pretrial instructions. (jaw) [Entry date 04/07/97]
4/16/97	–	File forwarded to staff law clerk: RHD (jaw) [Entry date 04/16/97]
4/18/97	15	Return of service executed 4/15/97 as to J. Wayne Garner, James T. Morris, Garfield Hammonds, Jr., Bobby K. Whitworth, Timothy E. Jones By serving Diane Avery on original complaint (jaw) [Entry date 04/22/97]
5/15/97	–	SUBMITTED to Judge Charles A. Moye Jr. on [8-1] motion for appointment of counsel, [9-1] motion for evidentiary hearing, [10-1] motion for leave to file discovery (jaw) [Entry date 05/15/97]
5/15/97	16	ANSWER by defendant to complaint Discovery ends 10/12/97 (jaw) [Entry date 05/20/97]

5/20/97	17	ORDER by Judge Charles A. Moye Jr. DENYING [8-1] motion for appointment of counsel, DENYING [9-1] motion for evidentiary hearing, DENYING [10-1] motion for leave to file discovery by Robert L. (c/pla & c/to RHD) (jaw) [Entry date 05/22/97] APPEAL
5/27/97	18	MOTION by defendants for summary judgment with brief in support. (jaw) [Entry date 06/04/97]
5/28/97	19	MOTION by plaintiff for summary judgment with brief in support. (jaw) [Entry date 06/04/97] [Edit date 06/04/97]
6/4/97	–	Notice of [18-1] motion for summary judgment by J. Wayne Garner filed 5/27/97 mailed 6/4/97. (jaw) [Entry date 06/04/97]
6/4/97	–	Notice of [19-1] motion for summary judgment by Robert L. Jones filed 5/29/97 mailed 6/4/97. (jaw) [Entry date 06/04/97]
6/11/97	20	Response by plaintiff to [18-1] notice to respond to motion for summary judgment (jaw) [Entry date 06/26/97]
6/13/97	21	Response by defendant to [19-1] motion for summary judgment (jaw) [Entry date 06/26/97]
6/24/97	22	Unilateral Certificate of interested persons. Dft Only (to judge) (jaw) [Entry date 06/26/97]
6/26/97	–	Terminated submissions. (jaw) [Entry date 06/26/97]

6/26/97	–	SUBMITTED to Judge Charles A. Moye Jr. on [18-1] motion for summary judgment, [19-1] motion for summary judgment (jaw) [Entry date 06/26/97]
7/1/97	23	ANSWERS TO MANDATORY DISCLOSURES by defendant (jaw) [Entry date 07/09/97]
7/8/97	24	MOTION by defendants to compel answers to mandatory interrogs with brief in support. (jaw) [Entry date 07/11/97]
7/10/97	25	TRAVERSE by plaintiff to [16-1] dfts' answer (jaw) [Entry date 07/21/97] [Edit date 07/21/97]
7/10/97	26	Response by plaintiff to [18-1] motion for summary judgment (jaw) [Entry date 07/21/97]
7/10/97	27	MOTION by plaintiff for an order allowing that he be provided with copies of all documents filed with this court. (jaw) [Entry date 07/21/97]
7/17/97	28	TRAVERSE by plaintiff to [23-1] answer interrogatory(s) (jaw) [Entry date 07/28/97]
7/17/97	29	Unilateral Preliminary Statement and Scheduling Order. Dft Only (to judge) (jaw) [Entry date 07/28/97]
8/1/97	30	TRAVERSE by plaintiff Robert L. Jones to [29-1] Unilateral preliminary statement & scheduling order (jaw) APPEAL [Entry date 08/11/97]
8/1/97	31	MOTION by plaintiff for appointment of counsel (jaw) [Entry date 08/11/97]

8/1/97	–	Case administratively reopened. See order of 2/11/97. (jaw) [Entry date 08/26/97]
8/4/97	–	SUBMITTED to Judge Charles A. Moye Jr. on [24-1] motion to compel answers to mandatory interrogs, [27-1] motion for an order allowing that he be provided with copies of all documents filed with this court (jaw) [Entry date 08/04/97]
8/21/97	–	SUBMITTED to Judge Charles A. Moye Jr. on [31-1] motion for appointment of counsel (you have file) (jaw) [Entry date 08/21/97]
8/21/97	32	Reply by defendants in support of [18-1] motion for summary judgment (jaw) [Entry date 08/26/97]
8/25/97	33	ORDER by Judge Charles A. Moye Jr. GRANTING [18-1] dfts' motion for sum.jgm., denying [19-1] pla's motion for sum.jgm., denying as moot [24-1] motion to compel, [27-1] motion for an order, motion for appt. of cnsl. Clerk directed to enter judgment in favor of dfts' and close case (cc) (jaw) [Entry date 08/26/97] [Edit date 08/26/97]
8/25/97	34	JUDGMENT ENTERED for defendants against plaintiff (jaw) [Entry date 08/26/97]
8/25/97	–	Case terminated. (jaw) [Entry date 08/26/97]
8/26/97	35	Response by defendant to [31-1] motion for appointment of counsel (jaw) [Entry date 09/02/97]

9/2/97	36	TRAVERSE by plaintiff Robert L. Jones to [32-1] reply in support of dft's motion for sum jgm. (pa) [Entry date 09/08/97] [Edit date 07/07/99]
9/5/97	37	NOTICE OF APPEAL by plaintiff from [34-1] judgment, [33-1] order (cc) (djh) [Entry date 09/15/97]
9/15/97	–	Notice of appeal and certified copy of docket, order & judgment to USCA RE: [37-1] appeal (djh) [Entry date 09/15/97]
9/15/97	–	SUBMITTED to Judge Charles A. Moye Jr. on [37-1] appeal for in forma pauperis determination. (djh) [Entry date 09/15/97]
9/18/97	–	Acknowledgment by USCA regarding appeal pkt USCA dkt no. 97-9009 (djh)[Entry date 10/08/97] APPEAL
9/23/97	38	ORDER by Judge Charles A. Moye Jr. GRANTING [37-1] pla's motion to appeal in forma pauperis, GRANTING certificate of probable cause to appeal (cc/w cert to USCA) (jaw) [Entry date 09/24/97]
9/29/97	–	Acknowledgment by USCA regarding appeal pkt USCA dkt no. 97-9009 (djh) [Entry date 10/08/97]
10/17/97	–	REQUEST from USCA for original papers. (epm) [Entry date 10/21/97]
10/21/97	–	Original papers sent to USCA per request. (2 vols. pleadings) (epm) [Entry date 10/21/97]
10/24/97	–	Acknowledgment by USCA regarding receipt of Original papers. USCA dkt no. 97-9009 (epm) [Entry date 10/31/97]

11/25/97 – Record on appeal returned from USCA re: [37-1] appeal USCA dkt. # 97-9009, consisting of 2 vols of original papers (jaw) [Entry date 12/04/97]

11/25/97 – Request for Certificate of Readiness from Court of Appeals regarding [37-1] appeal USCA dkt no. 97-9009 (epm) [Entry date 12/05/97]

11/25/97 39 Certified copy of ORDER of USCA RE: Appeal [37-1] Notice of appeal, denying as moot because the District Court granted motion for leave to proceed ifp on appeal. Appellant's motion for appt. of cnsl. on appeal is GRANTED, USCA dkt no. 97-9009 <1st EOD 12/4/97, redocketed for proper linkage> (jaw) [Entry date 05/01/98] [Edit date 05/01/98]

12/5/97 – CERTIFICATE OF READINESS OF RECORD ON APPEAL with certified copy of docket mailed to USCA re: appeal USCA dkt. # 97-9009 (1 vol. pleadings) (epm) [Entry date 12/05/97]

12/9/97 – Acknowledgment by USCA regarding COR [0-0] USCA dkt no. 97-9009 (djh) [Entry date 12/30/97]

6/9/98 – FORTHWITH LETTER from USCA regarding [37-1] appeal. USCA dkt no. 97-9009. (dj) [Entry date 06/11/98]

6/11/98 – Certified and TRANSMITTED RECORD to USCA RE: appeal [37-1]. USCA dkt no. 97-9009. (dj) [Entry date 06/11/98]

6/23/98 – Acknowledgment by USCA regarding ROA [0-0], [37-1] (1 vol. pleadings).

USCA dkt no. 97-9009. (dj) [Entry date 06/25/98]

2/26/99 – Updated copy of docket sheet mailed to pla per his letter request of 2/26/99. Letter placed in correspondence. (jaw) [Entry date 03/09/99] APPEAL

3/14/99 – Docket sheet of civil action 1:95-cv-3012-CAM mailed to Albert Thomas who has a civil action pending in this court under civil action 1:96-cv-527-JOF, pla per his letter request rec'd 3/4/99. Pla also requested a coy of order 1/6/99 which is not on file. (jaw) [Entry date 03/14/99] [Edit date 03/14/99]

4/29/99 40 Certified copy of JUDGMENT of USCA REVERSING and REMANDING to the District Court for further action RE: [37-1] appeal USCA dkt. # 97-9009 (tcc) [Entry date 04/30/99] [Edit date 05/10/99]

4/29/99 – Case reopened. (tcc) [Entry date 04/30/99]

4/30/99 – Proposed mandate order (to CAM) (tcc) [Entry date 04/30/99]

5/7/99 – Appeal record returned from USCA RE: [37-1] appeal USCA dkt. # 97-9009 consisting of 1 vol orig record on appeal. (jaw) [Entry date 05/17/99]

5/11/99 41 MOTION by movant Majee Diaab to intervene with brief and affidavit to proceed ifp in support. (jaw) [Entry date 05/17/99]

5/13/99 42 ORDER by Judge Charles A. Moye Jr. having read and considered [40-1] the

		mandate of United States Court of Appeals (USCA), it is ORDERED and ADJUDGED that the mandate [40-1] is hereby made the judgment of this Court, (cc) (jaw) [Entry date 05/17/99]
5/18/99	45	MOTION by Pless Brown for leave to intervene, and claims for relief with brief in support. (shb) [Entry date 06/01/99]
5/19/99	43	MOTION by intervenor-plaintiff Mikhail Sharieff Al'Shabazz for leave to intervene and claims for relief with brief in support. *motion docketed per order of 5/19/99 in case No. 1:99-cv-1048-CAM* (jaw) [Entry date 05/21/99] [Edit date 05/21/99]
5/19/99	44	Affidavit in support of ifp re: motion to intervene. *affidavit docketed re: order of 5/19/99 in case No. 1:99-cv-1048-CAM* (jaw) [Entry date 05/21/99] [Edit date 05/21/99]
5/21/99	–	Rec'd letter from mov Najee Diaab regarding the status of [41-1] his motion to intervene. Updated copy of docket sheet mailed. (jaw) [Entry date 06/02/99] APPEAL
5/26/99	46	ORDER by Judge Charles A. Moye Jr. GRANTING IN PART AND DENYING IN PART [18-1] motion for summary judgment by J. Wayne Garner, GRANTING IN PART AND DENYING IN PART [19-1] motion for summary judgment by Robert L. Jones denying as moot [41-1] motion to intervene by Majee Diaab, DFts' are hereby DIRECTED to take all steps necessary to comply with this court's holdings as set forth by the Court of appeals with

		respect to pla as well as all others where appropriate, Clerk DIRECTED TO close this case, (cc) (jaw) [Entry date 06/02/99]
5/26/99	–	Case terminated. (jaw) [Entry date 06/02/99]
6/11/99	47	MOTION by defendant to alter judgment, or to amend [4-1] judgment with brief in support. (jaw) [Entry date 06/15/99]
6/16/99	48	MOTION by movant Majee Diaab for reconsideration of [46-1] order with brief in support. (bek) [Entry date 06/17/99]
6/28/99	–	SUBMITTED to Judge Charles A. Moye Jr. on [47-1] motion to alter judgment, [47-2] motion to amend [4-1] judgment (jaw) [Entry date 06/28/99]
6/30/99	49	NOTICE OF APPEAL by intervenor-plaintiff from [46-1] order Appeal information sheet due 7/14/99 (AIS & IFP Form sent to petitioner) (epm) [Entry date 07/01/99]
6/30/99	49	MOTION by intervenor-plaintiff to proceed in forma pauperis with brief in support. (epm) [Entry date 07/01/99]
7/1/99	–	SUBMITTED to Judge Charles A. Moye Jr. on [49-1] motion to proceed in forma pauperis (FILE IN CHAMBERS) (epm) [Entry date 07/01/99] [Edit date 07/01/99]
7/1/99	–	Notice of appeal and certified copy of docket to USCA RE: [49-1] appeal (epm) [Entry date 07/01/99]
7/6/99	50	CONSENT ORDER by Judge Charles A. Moye Jr., extending time until 7/31/99 to

file Notice of Appeal. (cc) (aet) [Entry date 07/06/99]

7/6/99 51 ORDER by Judge Charles A. Moye Jr. DENYING [48-1] motion for reconsideration of [46-1] order by Najee Diaab, DENYING [43-1] motion for leave to intervene and claims for relief by Mikhail Sharieff Al'Shabazz, DENYING [45-1] motion for leave to intervene by Pless Brown, DENYING [45-2] motion claims for relief by Pless Brown, GRANTING [47-1] motion to alter judgment, GRANTING [47-2] MOTION TO AMEND [4-1] JUDGMENT, denying [49-1] MOTION TO PROCEED IN forma pauperis by Mikhail Sharieff Al'Shabazz as MOOT. All proceedings shall be STAYED until the USSC reaches a decision reg. the petition for writ of cert. Defendants are hereby DIRECTED to promptly NOTIFY this court of any such resolution (cc) (bek) [Entry date 07/07/99] APPEAL

7/21/99 52 Acknowledgment by USCA RE: [49-1] appeal USCA dkt no. 99-120731 (als) [Entry date 07/26/99]

8/9/99 – USCA request of Docs. # 44 & 48 RE: [49-1] appeal USCA # 99-12073-I (epm) [Entry date 08/10/99]

8/10/99 – Forwarded Certified copy – Docs. # 44 & 48 to the USCA RE: [49-1] appeal USCA # 90-12073-I (epm) [Entry date 08/10/99]

8/31/99 – USCA acknowledgment of Doc. # 51 RE: [49-1] appeal USCA # 99-12073-I (als) [Entry date 09/01/99]

8/31/99 – USCA acknowledgment of Docs. # 44 & 48 RE: [49-1] appeal USCA # 99-12073-I (epm) [Entry date 09/01/99]

9/30/99 53 Notice of Supreme Court grant of Certiorari by defendant (as) [Entry date 10/04/99]

10/15/99 – USCA request of ORIGINAL PAPERS RE: [49-1] appeal USCA # 99-12073-I (als) [Entry date 10/20/99]

10/20/99 – Forwarded ORIGINAL PAPERS to the USCA RE: [49-1] appeal USCA # 99-12073-I (2 vol. pldgs) (als) [Entry date 10/20/99]

[ORIGINAL DOCUMENT HANDWRITTEN]

CIVIL RIGHTS COMPLAINT UNDER 42 U.S.C. § 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Robert L. Jones – D.020489
Ware C.I. 3620 Harris Rd.
Waycross, Georgia 31501
(Enter above the full name and prisoner identification number of the plaintiff(s).)

1 95-CV-3012CAM

-vs-

J. Wayne Garner Chairman, et. al
State Board of Pardons
And Paroles
(Enter above the full name of the defendant(s).)

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes ( ) No (✓)

B. If your answer to A is yes, describe each lawsuit in the space below, (if there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit

Plaintiffs: N/A

Defendants: _____

2. Court (if federal court, name the district; if state court, name the county): _____

3. Docket Number: N/A

4. Name of judge to whom case was assigned: _____

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?) _____

6. Approximate date of filing lawsuit: _____

7. Approximate date of disposition: N/A

II. Place of Present Confinement: Ware C.I. Waycross, GA. 31501

A. Is there a prisoner grievance procedure in this institution?

Yes (✓) No ( )

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure?

Yes (✓) No ( )

C. If your answer is YES:

1. What steps did you take? I Filed A Request For Reconsideration

2. What was the result? No Reply

D. If your answer is NO, explain why not: _____

III. Parties

(In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiff, if any.)

A. Name of plaintiff Robert L. Jones Ware C.I.

Address 3620 Harris Rd. Waycross, Georgia 31501

(In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.)

B. Defendant J. Wayne Garner Chairman Et. Al

Employed as Chairman State Board of Pardons And

at Paroles, 2-Marton Luther King Jr. Drive S. E

C. Additional defendants: Atlanta, Georgia 30334

IV. Statement of Claim

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheets if necessary.)

This complaint are based on a decision handed down from State Board of Pardons and Paroles. Denying plaintiff parole with deprivation, under color of state law. Rights secured by the United States Constitution. The court has jurisdiction under 28 U.S.C. and 1343. Plaintiff's seeks declaratory relief pursuant to 28 U.S.C. §§ 2201, and 2202.

Plaintiff's contends he been denied due process, and equal protection of law under color of law. Also a violation of ex-post factor clause of the United States Constitution, by the change in the state parole board. "See, Attach Sheet"

V. Relief

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.

Plaintiff is vexed without no adequate plain complete remedy at law to redress the constitutional wrongs addressed, and discribed [sic] herein. Plaintiff has been, and is continuing to be irreparable injured by the conduct, and actions of defendants unless the court grants the declaratory, and injunctive relief which plaintiff seeks.

Wherefore, plaintiff respectfully requests that this court enter a judgment granting him: see, attached sheet.

Attach seet [sic]. IV. Statement of Claim (Con'd)

Of February 1, 1985. Place the plaintiff, at a substantive disadvantage by applying terms of the rules chang [sic] to prospective paroles sentenced prior to rule change:

On August 16-20, plaintiff was tried, and convicted for the offense of murder, and sentence to life inprisonment [sic].

On August of 1989. Plaintiff was consider for parole. And on September 29, 1989 plaintiff was denied parole at that time. The main reasons for the decision cited by the board mumbers [sic] during their individual study of the case was "multiple

offenses." And the board decided to consider plaintiff again for parole during August of "1997" "notice" plaintiff. Filed motion to intervene May 15, 1991, this intervene motion was to enjoin C.T. Akins, Jay M. Fate. and filed in clerk's office U.S.D.C.-Atlanta June 3, 1991. By Luther D. Thomas, clerk, deputy clerk. Case No. 1'88-2421-RCF.

As a result, plaintiff was consider again in August of 1992. And was denied for the same reason stated in his 1989 decision. And was decided to be considered August of "1995" whach [sic] plaintiff was allowed to meet wite [sic] (1) one member of the board "so he said" Anyway, plaintiff was interviewed by this Mr. Smith. On Oct. 13, 1995. Plaintiff received a denyal [sic]. Dated. September 29, 1995 which stated: "you have been throughly [sic] and carefully considered for parole.

The board decision during their individual study of your case. Are circumstances, and nature of offense, and multiple offenses. The board has decided to consider you again for parole during August 2003.

(1)

Plaintiff. contends. That the denial of parole on September 29, 1995. "is" unconstitution [sic]. And Inadequate.

(2)

Plaintiff. contends. The board based their decision by using of parole criteria which are vague and ambiguous.

(3)

Plaintiff. contends. That the following decision of the parole board are "Racial Discrimination." Retaliation. Etc.

(4)

Plaintiff. contends. He has been denied due process, and equal protection of law under the color of law.

(5)

This decision from the board are inviolation [sic] of the ex-post factor clause of the United States Constitution.

In support of these issues. As follow:

1. Plaintiff. contends. That the denial of parole on September 29, 1995 "is" unconstitution [sic], and inadequate. The court held, if you are denied parole the board must give you a written statement of the reason for its decision, "vague reason are not enought [sic]. Conclusory statement not supported by the record are insufficient. And, simply stating that "the seriousness of your crim" is the reason for denial of parole has been held. Constitutionally inadequate. So has the mere statement that to release you "would depreciate the seriousness of your offense. Also the circumstances, and nature of the offense and multiple offenses . . .

2. Plaintiff. contends. That the board based their decision by using of parole criteria which are vague, and ambiguos. However, this issue are very clear. on wrongfully denied. However, where parole ard [sic] denied on the basis of erroneous information or misinformation, or unduly vague standards or criteria. or on a failure to provide minimum due process safeguards, the court will intervened for example, a parole board may not

deny parole to prisoner because of religious prejudice, by considering an description of the conduct underlying an offense, on the basis of an illegal disciplanary [sic] proceedure [sic], or by use of parole criteria. which are vague, and ambiguous . . .

3. Plaintiff. contends. that the following decision of the parole board are racial discrimination, and retaliation etc. which will be exsplain [sic] in ground # 4. That plaintiff, has been denied due process and equal protection of law under color of law . . . as plaintiff have said previously. Issue held that a prison is entitled to some due process safeguards. In the parole hearing stage. The particular due process protection discussed by the courts usually involve (1) meaningful reason for denial of parole, (2) access by the prisoner to his files, or to information to be considered by the board, and an opportunity to rebut erroneous information, (3) comprehensive explanatory guidelines for prisoners with respect to the rules, and procedures, # 4. representation by counsel, or advisor and # 5. An opportunity for the prisoner to present an affirmative case for parole. E.g., . . .

5. The main issue. This decision from the board are in violation of the ex-post factor clause of the United States Constitution.

Plaintiff contends. That he was tried, and convicted for the offense murder and sentence to life inprisonmend [sic] on August 16-20, 1982. And to deny plaintiff consideration for parole until 2003. Violated the ex-post clause.

Plaintiff. contends. Until 1979, a prison serving a life sentence in Georgia would be initially considered for

parole after serving (7) siven [sic] years, and would be reconsider every year thereafter . . .

On December 1, 1979 the state board of pardons/paroles. "the board" revised the applicable rule to require reconsideration every (3) three years after the initial seven. On February 1, 1985 "the board again revised the rule to allow an (8) eight years interval between reconsideration. However, plaintiff crime were committed before revision of the rules. But, the plaintiff are being required to serve (8) years between parole consideration pursuant to the new rules. Plaintiff, assert this is a violation of the ex-post factor clause.

Plaintiff contends. Until "1973" the board consisted of (3) three members. In 1973 the board increased to (5) five members. Subsequently, a convict must secure the voit [sic] of (3) three of the (5) five member in order to gain release.

Plaintiff contends. His crime was committed in "1982" however, he should be consider for parole under the sistem [sic] requiring (3) three voites [sic] for release wite [sic] as (8) eight years set-off truly are in violation of the ex-post foctor [sic] clause. Which are guridtees [sic] by the United States Constitution

Plaintiff contend, that he has been denied all the rights inbeded [sic] within this petition, and will continue to be unless what he seeks in this petition be granted. If, not conceivable, the board could at any time amend its rules to require a life sentence inmate to serve (50) fifty years without consideration for parole, and apply this rule to all inmates, serving life sentence. Indeed, the

board could at whim. Lengthen to the extent of effectively violing [sic] "all" prisoner's eligaibility [sic] dates – without running a foul of the ex-post factors prohibition.

ATTACHED SHEET

RELIEF.

1. A preliminary and premanent [sic] injuction [sic] which prohibits the defendants, and their successors from denying plaintiff his constitutional, and state, and fedral [sic] rights. Prohibit defendants during the pending of this lawsuit, or otherwise retaliating against plaintiff in anyway.

2. A declaratory judgment that the defendants acts, policies, and practices herein described and complained of violated plaintiff rights under the United States Constitution, and the ex-post factor clause controled [sic] by Atkin [sic] v. Snow.

3. Defendants pay cost of action.

4. Jury trial

5. Appointment of counsel.

6. Damages as follows:

a. Compensation damage for each defendant, $10,00.00

b. Punitive damages Et. al $10,00.00

c. Pain, and suffering, and emotional distress. Et. al $10,00.00

d. Nominal damages, Et. al $10

e. Any relief that the court deems just, and proper.

Wherefore, plaintiff. Respectfully requests this motion be granted, and further relief that the deems to be appropriate and just . . .

Signed this 23 day of Oct. 1995

Respectfully submitted
Robert Lee Jones D. 020489
Robert L. Jones, Pro se
Ware C.I. 3120 Harris Rd.
Waycross, GA. 31501

State of Georgia
Ware County C.I.
Waycross, Georgia 31501

I declare under penalty of perjury that the foregoing is true and correct. Executed on 10/23/95

/s/ Robert L. Jones
Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

Robert L. Jones D. 020489 Petitioner	:	AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS
-vs-	:	
J. Wayne Garner, Chairman, Et. al Respondent(s)	:	

I, Robert L. Jones, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to questions and instrutions [sic] below are true.

1. Are you presently employed: Yes ( ) No (✓)

   a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

   b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received.

   May of 1982 about, $14,00.00 per month

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment? Yes ( ) No (✓)
   b. Rent payments, interest or dividends? Yes ( ) No (✓)
   c. Pensions, annuities or life insurance payments? Yes ( ) No (✓)
   d. Gifts or inheritances? Yes ( ) No (✓)
   e. Any other sources? Yes ( ) No (✓)

   If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months.

   N/A

3. Do you own any cash, or do you have money in a checking or savings account?
   Yes ( ) No ( ) (Include any funds in prison accounts.) If the answer is yes, state the total value of the items owned.

   Listed below

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ( ) No (✓) If the answer is yes, describe the property and state its approximate value.

   N/A

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

   N/A

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 23 day of Oct, 1995.

/s/ Robert L. Jones, D.020489
Signature of Movant

CERTIFICATE

I hereby certify that the plaintiff herein has the sum of $ 41¢ on account to his credit at the Ware Correctional institution where he is confined. I further certify that plaintiff likewise has the following securities to his credit according to the records of said _____ institution:
WARE CORRECTIONAL INSTITUTION
3620 HARRIS ROAD
WAYCROSS, GEORGIA 31501

/s/ Rebecca Blanchard 10-23-95
Authorized Officer of Institution

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT L. JONES,	*	
Plaintiff,	*	CIVIL ACTION NO.
v.	*	NO. 1:95-cv-3012-CAM
J. WAYNE GARNER, et al.,	*	
Defendants.	*	

ANSWER

(Filed May 15, 1997)

Come now ***J. WAYNE GARNER***, former Chairman, State Board of Pardons and Paroles, ***JAMES T. MORRIS***, former Chairman, State Board of Pardons and Paroles, ***GARFIELD HAMMONDS, JR.***, former Chairman, State Board of Pardons and Paroles, ***BOBBY K. WHITWORTH***, Member, State Board of Pardons and Paroles, and ***TIMOTHY E. JONES***, former Member, State Board of Pardons and Paroles, Defendants in the above-styled action, by counsel, Michael J. Bowers, Attorney General for the State of Georgia, and submit this their Answer and defenses to Plaintiff's Complaint in the above-styled action as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Defendants are entitled to a qualified immunity from suit.

THIRD DEFENSE

Defendants are entitled to a quasi-judicial immunity from suit for damages.

FOURTH DEFENSE

Plaintiff has failed to exhaust available state remedies.

FIFTH DEFENSE

Plaintiff has no liberty interest in parole or in the parole consideration process.

SIXTH DEFENSE

Plaintiff's Complaint is barred by the applicable statute of limitations.

SEVENTH DEFENSE

Responding to the allegations contained in Plaintiff's Complaint, Defendants answer as follows:

1.

In response to the allegations contained in the portion of Plaintiff's Complaint denominated "Previous Lawsuits," said allegations are hereby denied.

2.

In response to the allegations contained in the portion of Plaintiff's Complaint denominated "Place of Present Confinement," Defendants admit that Plaintiff is presently in the custody of the Georgia Department of Corrections, currently incarcerated at Ware State Prison in Waycross, Georgia. Defendants deny that Plaintiff has failed [sic] a grievance regarding his parole consideration, although Defendants note that such a claim is non-grievable.

3.

In response to the allegations contained in the portion of Plaintiff's Complaint denominated "Parties," Defendants admit that Plaintiff is presently incarcerated at Ware State Prison. Defendants admit that they are current or former members of the State Board of Pardons and Paroles.

4.

In response to the allegations contained in the portion of Plaintiff's Complaint denominated "Statement of Claim," said allegations are hereby denied as written. Defendants deny that any federally-protected constitutional right of Plaintiff has been violated by the Board during Plaintiff's incarceration.

5.

In response to the allegations contained in the portion of Plaintiff's Complaint denominated "Relief," said allegations are hereby denied.

6.

Defendants deny that Plaintiff is entitled to the relief requested, or to any relief whatsoever.

7.

Any allegation of fact or law contained herein not specifically admitted, denied, or otherwise controverted is hereby denied.

CONCLUSION

Wherefore, having answered the Complaint and stated their separate defenses and objections to jurisdiction, Defendants prays [sic] that the Petition be dismissed without requiring further response from them, that Plaintiff be assessed and Defendants awarded all costs incurred, including attorney's fees, and that all costs of this action be taxed against the Plaintiff.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

MARY BETH WESTMORELAND
750150
Deputy Attorney General

/s/ Carol A. Callaway
CAROL A. CALLAWAY
104590 by NBC
Senior Assistant Attorney
General

/s/ Neal B. Childers
NEAL B. CHILDERS 124410
Senior Assistant Attorney
General

Please serve:

NEAL B. CHILDERS
Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3355

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT L. JONES,	*	
	*	
Plaintiff,	*	CIVIL ACTION NO.
v.	*	NO. 1:95-cv-3012-CAM
	*	
J. WAYNE GARNER, et al.,	*	
	*	
	*	
Defendants.	*	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed May 27, 1997)

Come now ***J. WAYNE GARNER***, former Chairman, State Board of Pardons and Paroles, ***JAMES T. MORRIS***, former Chairman, State Board of Pardons and Paroles, ***GARFIELD HAMMONDS, JR.***, former Chairman, State Board of Pardons and Paroles, ***BOBBY K. WHITWORTH***, Member, State Board of Pardons and Paroles, and ***TIMOTHY E. JONES***, former Member, State Board of Pardons and Paroles, Defendants in the above-styled action, by counsel, Michael J. Bowers, Attorney General for the State of Georgia, and submit this their Motion for Summary Judgment in the above-styled action. This Motion is

supported by Brief and exhibits submitted contemporaneously herewith.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

MARY BETH WESTMORELAND
750150
Deputy Attorney General

/s/ Carol A. Callaway
CAROL A. CALLAWAY
1045901 by NBC
Senior Assistant Attorney General

/s/ Neal B. Childers
NEAL B. CHILDERS 124410
Senior Assistant Attorney General

Please serve:

NEAL B. CHILDERS
Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3355

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT L. JONES,	*	
	*	
Plaintiff,	*	CIVIL ACTION NO.
v.	*	NO. 1:95-cv-3012-CAM
J. WAYNE GARNER, et al.,	*	
	*	
Defendants.	*	

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. STATEMENT OF THE CASE

Plaintiff is a convicted felon, currently incarcerated at Ware State Prison in Waycross, Georgia, in the custody of the Georgia Department of Corrections. In his lawsuit, brought against five current and former members of the State Board of Pardons and Paroles, Plaintiff raises a single issue (it is Defendants' understanding that all remaining issues were dismissed by the Court, pursuant to 28 U.S.C. § 1915, prior to service of process).

Plaintiff alleges that the Board's decision to defer his next reconsideration for parole for a maximum of eight years, as authorized by Georgia law, violates his ex post facto rights by adversely effecting his potential for parole. Plaintiff contends that ***Akins v. Snow,*** 922 F.2d 1558 (11th Cir.), ***cert. denied,*** 501 U.S. 1260 (1991), prohibits the application of this rule to him.

II. STATEMENT OF FACTS

On July 23, 1974, Plaintiff was sentenced following conviction on murder charges in the Superior Court of Fulton County. Plaintiff was sentenced to life imprisonment for the murder of Jack Bell. On November 24, 1979, Plaintiff escaped. While on escape, Plaintiff killed Frances Tutt Bell. Plaintiff was convicted of her murder and sentenced to life imprisonment, again in the Superior Court of Fulton County, on August 20, 1982.

Plaintiff was initially considered for, and denied, parole on September 29, 1989. He was scheduled for reconsideration in August, 1997. Plaintiff was considered for a second time, and denied parole, on September 1, 1992. He was scheduled for reconsideration in August, 1995. On September 29, 1995, Plaintiff was reconsidered. He was denied parole and advised that his next reconsideration would come within eight years. Plaintiff thereupon filed suit.

III. ARGUMENT AND CITATION OF AUTHORITY

THE "SET-OFF" OF PLAINTIFF FOR FUTURE RECONSIDERATION OF PAROLE HAS NO MEANINGFUL EFFECT ON THE POSSIBILITY OF PAROLE FOR PLAINTIFF; THEREFORE, THE APPLICATION OF THE RULE TO PLAINTIFF DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

In ***Akins v. Snow,*** 922 F.2d 1558 (11th Cir.), ***cert. denied,*** 501 U.S. 1260 (1991), the United States Court of Appeals for the Eleventh Circuit ruled upon the application of Ga. Admin. Comp. Ch. 475-3-.05(2) to prisoners

whose crime had been committed prior to the amendments to that regulation. The Court found that a retroactive application would violate the ex post facto clause.

Akins has not received majority support among the circuits; indeed, it is the minority rule. ***See Bailey v. Gardebring,*** 940 F.2d 1150, 1157 (8th Cir. 1991). Following the decision of the United States Supreme Court in ***California Department of Corrections v. Morales,*** ___ U.S. ___, 115 S.Ct. 1597 (1995), the Eleventh Circuit itself noted that the continued vitality of ***Akins*** was "questionable." ***Jones v. Georgia Board of Pardons and Paroles,*** 59 F.3d 1145, 1149 (11th Cir. 1995). The Court did not, however, overrule ***Akins*** at that time, as the issue was not squarely before the Court.

In ***Morales,*** the Supreme Court outlined the factors which the court should apply in making the determination. The Court ruled that it is not the mere possibility of increased punishment which creates an ex post facto violation; rather, there is no violation if the change "creates only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes." ***Morales,*** 115 S.Ct. at 1604. ***See also Hill v. Jackson,*** 64 F.3d 163, 169-70 (4th Cir. 1995) (similar Virginia provision does not violate the ex post facto clause). As is demonstrated ***infra,*** the amendment in question falls within this category. Therefore, no violation is present.

First, the Court noted that the amendment applied only to a class of prisoners for whom the likelihood of release on parole is quite remote. ***Morales,*** 115 S.Ct. at 1603. In ***Hill,*** the Fourth Circuit found that a provision applicable to: (1) inmates serving a life sentence; (2)

inmates with a single sentence of seventy years or more for a violent offense, and at least ten years to serve before mandatory release; or (3) inmates with multiple consecutive sentences totalling at least 70 years, one of which is for a violent offense, and at least ten years to serve before mandatory release was sufficiently limited to satisfy ***Morales. Hill,*** 64 F.3d at 169. Georgia's regulation is more limited; it is limited in application solely to life sentence inmates. Only those who commit capital felonies or who are recidivists may receive a life sentence in Georgia. By definition, those who commit a capital felony or are recidivists are unlikely to receive parole. In Plaintiff's case, he has been convicted of multiple capital felonies (two counts of murder) in Georgia, including one murder committed after having escaped from custody. Thus, Plaintiff has been convicted of multiple capital felonies, is a recidivist, is an escape risk, and has a significant history of violence. Plaintiff clearly fits into the category of inmates "for whom the likelihood of release on parole is quite remote." ***Id.*** Thus, the first aspect of the ***Morales*** test is satisfied.

Secondly, the ***Morales*** court found that the Board's authority was carefully tailored because it had no effect upon initial eligibility, but affected only the timing of a subsequent review. Thus, the amendment would have no effect upon a prisoner unless the Board concluded, not only that parole should not be granted at that time, but that it would not be reasonable to expect that parole would be granted during the following years. ***Morales,*** 115 S.Ct. at 1604; ***Hill,*** 64 F.3d at 169. The same is true in Plaintiff's case. The amended regulation has no effect on Plaintiff's eligibility for parole; he first became eligible

for parole in 1989, and has remained eligible since that date. The only effect upon Plaintiff is upon the timing of subsequent reconsiderations. As in ***Morales,*** the Board has concluded in Plaintiff's case that, in light of the fact that Plaintiff has been convicted of multiple capital felonies, is a recidivist, is an escape risk, and has a significant history of violence, it is not reasonable to expect that he will be paroled in the near future.

The ***Morales*** court found significant the fact that the California statute did not preclude the California Board from expediting the prisoner's release date in appropriate circumstances. ***Morales,*** 115 S.Ct. at 1605; ***Hill,*** 64 F.3d at 169. At first blush, this might appear to distinguish the Georgia rule from the California statute, as the Eleventh Circuit in ***Akins*** stated that the Georgia regulation renders the inmate "effectively ineligible for parole between two parole reconsideration hearings." ***Akins,*** 922 F.2d at 1561. However, the Court was mistaken as to the effect of the regulation. As shown in Mr. Amideo's affidavit attached hereto, the "set-off" merely fixes the maximum time that will pass prior to reconsideration; the inmate is not ineligible for parole during this time, and may be reconsidered at an earlier time if circumstances warrant or if additional information is received by the Board. Thus, this aspect of the ***Morales*** test is also satisfied.

Finally, the ***Morales*** court found significant that the California Board retained the authority to establish a reconsideration schedule tailored to the circumstance of an individual inmate's case. ***Morales,*** 115 S.Ct. at 1604; ***Hill,*** 64 F.3d at 169. The same is true of the Georgia regulation. The regulation authorizes, but does not

require, the Board to delay reconsideration for a maximum of eight years. The Board could have scheduled a reconsideration at any time prior to the expiration of eight years, if it had seen fit to do so. It has chosen not to [sic] so in this case; however, because the Board retained that authority, the third ***Morales*** factor is also satisfied. Of course, should new information or changed circumstances warrant an earlier reconsideration, the Board has in place an existing means for doing so. ***Hill,*** 64 F.3d at 169.

Ultimately, then, the lesson of ***Morales*** is that procedural modifications by a Parole Board exercising discretionary authority do not violate the ex post facto clause when, as a practical matter, the changes create "only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes." ***Morales,*** 115 S.Ct. at 1605. That is precisely the situation present in the case at bar. Plaintiff has been convicted of multiple capital felonies, is a recidivist, is an escape risk, and has a significant history of violence. The Board has concluded, after extensive review of his case and three separate considerations for parole by the members of the Board, that it is unlikely that Plaintiff will be granted parole during the eight years following the latest reconsideration. Having made that determination, the Board may legitimately pursue the twin goals of (1) focusing the time-consuming and costly efforts of parole consideration on those with a reasonable chance of parole in the near future and those who have just become eligible for consideration and (2) provide the inmate with a realistic assessment of his chance for parole, rather than

inflating, then dashing, his hopes each year when he has no reasonable chance of parole at that time.

CONCLUSION

For the above and foregoing reasons, Defendants respectfully request that this Honorable Court grant Defendants' Motion for Summary Judgment and enter judgment in their favor.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

MARY BETH WESTMORELAND 750150
Deputy Attorney General

/s/ Carol A. Callaway
CAROL A. CALLAWAY 104590 by NBC
Senior Assistant Attorney General

/s/ Neal B. Childers
NEAL B. CHILDERS 124410
Senior Assistant Attorney General

Please serve:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT L. JONES,	*	
	*	
Plaintiff,	*	CIVIL ACTION NO.
v.	*	NO. 1:95-cv-3012-CAM
	*	
J. WAYNE GARNER, et al.,	*	
	*	
Defendants.	*	

DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Come now ***J. WAYNE GARNER,*** former Chairman, State Board of Pardons and Paroles, ***JAMES T. MORRIS,*** former Chairman, State Board of Pardons and Paroles, ***GARFIELD HAMMONDS, JR.,*** former Chairman, State Board of Pardons and Paroles, ***BOBBY K. WHITWORTH,*** Member, State Board of Pardons and Paroles, and ***TIMOTHY E. JONES,*** former Member, State Board of Pardons and Paroles, Defendants in the above-styled action, by counsel, Michael J. Bowers, Attorney General for the State of Georgia, and submit this their Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment.

1.

On July 23, 1974, Plaintiff was sentenced following conviction on murder charges in the Superior Court of Fulton County. Plaintiff was sentenced to life imprisonment.

2.

On November 24, 1979, Plaintiff escaped from custody.

3.

While on escape, Plaintiff killed Frances Tutt Davis on March 26, 1982. Plaintiff was convicted of her murder and sentenced to life imprisonment on August 20, 1982 and sentenced to life imprisonment in the Superior Court of Fulton County.

4.

Plaintiff was considered for parole on September 29, 1989, and denied at that time. He was advised that his next reconsideration would come within eight years.

5.

On September 1, 1992, Plaintiff was reconsidered. He was denied parole and again advised that his next reconsideration would come within three years.

6.

On September 29, 1995, Plaintiff was reconsidered for parole, was denied parole, and was advised that his next reconsideration would come within eight years.

7.

Georgia's regulation governing the deferral of parole reconsideration is limited in application solely to life sentence inmates. Only those who commit capital felonies or who are recidivists may receive a life sentence in Georgia.

8.

Life sentence inmates are a category of inmates "for whom the likelihood of release on parole is quite remote."

9.

The amended regulation has no effect on Plaintiff's eligibility for parole; he first became eligible for parole in 1989, and has remained eligible since that date. The only effect upon Plaintiff is upon the timing of subsequent reconsiderations.

10.

The reconsideration deferral, or "set-off," merely fixes the maximum time that will pass prior to reconsideration; the inmate is not ineligible for parole during this time, and may be reconsidered at an earlier time if circumstances warrant or if additional information is received by the Board.

11.

The regulation authorizes, but does not require, the Board to delay reconsideration for a maximum of eight years. The Board can schedule a reconsideration at any time prior to the expiration of eight years, although it has not seen fit to do so in Plaintiff's case.

12.

Ga. Admin. Comp. Ch. 475-3-.05(2) may be constitutionally applied to Plaintiff without violating the ex post facto clause.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

MARY BETH WESTMORELAND 750150
Deputy Attorney General

/s/ Carol A. Callaway
CAROL A. CALLAWAY 104590 by NBC
Senior Assistant Attorney General

/s/ Neal B. Childers
NEAL B. CHILDERS 124410
Senior Assistant Attorney General

Please serve:

NEAL B. CHILDERS
Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3355

DEFENDANT'S EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT L. JONES, Plaintiff	)	CIVIL ACTION NO. 1:95-CV-3012-CAM
v.	)	
J. WAYNE GARNER, ET. AL. Defendants	)	

AFFIDAVIT OF WILLIAM F. AMIDEO

Personally appeared before me, the undersigned officer, authorized to administer oaths in and for the State of Georgia, William F. Amideo, who, having been first duly sworn, did state under oath the following:

1.

My name is William F. Amideo, I am *sui juris* and competent to testify in this matter.

2.

I give this affidavit as evidence in the above styled action, and for any other lawful purpose.

3.

I am employed as Director of Legal Services for the State Board of Pardons and Paroles and in my official capacity also serve as Secretary of the Board and custodian of all records maintained by the Board on persons subject to the constitutional jurisdiction of the Board.

4.

I make this Affidavit based upon my personal knowledge of its contents.

5.

I have examined the records of the Board pertaining to inmate Robert Jones, D-20489.

6.

On July 23, 1974, Robert Jones was convicted in Fulton Superior Court of the murder of Jack Bell. On that date he was sentenced to the Department of Corrections for life. Under the then existing Georgia law he would have first been considered for parole in 1981.

7.

On November 24, 1979, Robert Jones excaped [sic] from the custody of the Georgia Department of Corrections. While on escape he stabbed Frances Tutt Davis on March 26, 1982. Ms. Davis died on April 2, 1982. Robert Jones was convicted of the murder of Frances Tutt Davis in Fulton Superior Court on August 20, 1982 and sentenced to life imprisonment.

8.

In September of 1989, Mr. Jones was first considered for parole. The Board voted to deny parole to Mr. Jones and notified him by letter dated September 29, 1989, which is attached as Exhibit 1. Pursuant to the Board's then existing policy, Mr. Jones was scheduled for reconsideration of parole in August of 1997.

9.

Pursuant to the decision of the United States Court of Appeals on February 7, 1991, in *Akins v. Snow*, 922 F. 2d 1558 (11th Cir 1991), the Board adopted a new policy of reconsidering life sentenced inmates for parole at three year intervals for those inmates whose convictions occurred between December 1, 1979 and February 1, 1985. Accordingly, Mr. Jones was reconsidered by the Board in July of 1992. Mr. Jones was denied parole by vote of the Board and notified in a letter dated September 1, 1992, which is attached as Exhibit 2. Mr. Jones was then scheduled for reconsideration of parole in August of 1995.

10.

In August of 1995, the Board again reconsidered Mr. Jones for parole. The Board decided at that time to deny parole to Mr. Jones. Further, based upon the decision of the United States Supreme Court in April of 1995, in the case of *California Department of Corrections v. Morales*, 115 S. Ct. 1597 (1995), the Board found that the circumstances of his multiple violent offenses made it not reasonably likely that he would be paroled within eight years of the August, 1995, reconsideration. Accordingly, after its full review of the relevant facts, the Board denied parole to Mr. Jones and reset his next consideration for August of 2003. Mr. Jones was informed of the Board's decision in a letter dated September 29, 1995, which is attached as Exhibit 3.

11.

Under the Board's current policy, life sentenced inmates who have committed capital offenses and

inmates serving life sentences under Georgia's Serious Violent Felony Recidivist Laws may be set-off from one to eight years for reconsideration for parole after their statutorily established first consideration for parole. The time of the initial parole eligibility is not affected by the set-off for reconsideration. In each case where a reconsideration is set-off for up to eight years, the Parole Board has made an individualized finding, after a full review of the facts of the case, that there is no reasonable expectation that parole would be granted in the intervening years. Further, the Board has an existing expedited review procedure to evaluate a case during the intervening set-off period should new information or circumstances warrant a sooner review. Finally, the Board retains the authority to change the frequency of suitability reviews to meet its needs. A copy of the existing Board policy is attached as Exhibit 4.

12.

Race is not, and has never been, a criterion for the Board in making parole decisions nor in determining the period for reconsideration of parole of a life sentenced inmate.

13.

The primary named defendant, J. Wayne Garner, is no longer a member of the State Board of Pardons and Paroles. The current members of the State Board of Pardons and Paroles are listed as follows: Walter Ray, Chairman, Jim Wetherington, Vice Chairman, Bobby

Whitworth, Member, Garfield Hammonds, Member, Dr. Betty Ann Cook, Member.

Further Affiant saith not.

/s/ William F. Amideo
William F. Amideo,
Director
Legal Services
State Board of Pardons
and Paroles

Sworn to and subscribed before
me upon this ___ day of April,
1997.

_____

Notary Public
My commission expires

Exhibit 1

STATE BOARD OF PARDONS AND PAROLES

Fifth Floor, East Tower
Floyd Veterans Memorial Building
2 Martin Luther King, Jr. Drive, S.E.
Atlanta, GA 30334

[Names Omitted In Printing]

September 29, 1989

Mr. Robert Jones, D-20489
C/O Warden
Georgia State Prison
Reidsville, GA

Dear Mr. Jones:

You have been thoroughly and carefully considered for parole. The Board's decision is to deny parole at this time. The main reasons for the decision cited by the Board members during their indivdual [sic] study of your case are multiple offenses.

The Board has decided to consider you again for parole during August 1997.

Sincerely,

FOR THE BOARD:

Elizabeth Reynolds, Supervisor
Disposition Unit

ER/np

cc Warden
Parole Supervisor
GDC Classification and Assignment Section

Exhibit 2

STATE BOARD OF PARDONS AND PAROLES

Fifth Floor, East Tower
Floyd Veterans Memorial Building
2 Martin Luther King, Jr., Drive, S.E.
Atlanta, Georgia 30334

[Names Omitted In Printing]

September 1, 1992

Mr. Robert Jones, D-20489
C/O Warden
Ware Correctional Institute
Waycross, GA

Dear Mr. Jones:

You have been thoroughly and carefully considered for parole. The Board's decision is to deny parole at this time. The main reasons for the decision cited by the Board members during their individual study of your case are circumstances and nature of the offense and multiple offenses.

The Board has decided to consider you again for parole during August 1995.

Sincerely,

FOR THE BOARD:

/s/ Elizabeth Fortson
Elizabeth Fortson, Supervisor
Disposition Unit

EF/np

cc: Warden
Parole Supervisor Office
GDC - File

Exhibit 3

State Board of Pardons and Paroles

(LOGO)

FLOYD VETERANS MEMORIAL BUILDING
2 MARTIN LUTHER KING, JR. DRIVE, S.E.
FIFTH FLOOR, EAST TOWER
ATLANTA, GA 30334-4309
(404) 656-5651

[Names Omitted In Printing]

September 29, 1995

Mr. Robert Jones, D-20489
C/O Warden
Ware Correctional Institute
Waycross, Ga.

Dear Mr. Jones:

You have been thoroughly and carefully considered for parole. The Board's decision is to deny parole at this time. The main reasons for the decision cited by the Board members during their individual study of your case are circumstances and nature of the offense, and multiple offenses.

The Board has decided to consider you again for parole during August 2003.

Sincerely,

FOR THE BOARD:

/s/ E. Fortson
E. Fortson, Senior Supervisor
Disposition Unit

EF/th

cc: Warden
Parole Supervisor Office Dist. #
GDC – File

Exhibit 4

(LOGO) State Board of Pardons and Paroles

BOARD POLICY STATEMENT

POLICY: Interval for Reconsideration of Parole Denials in Life Sentence Cases

NUMBER: 4.110

PAGE 1 OF 2

EFFECTIVE DATE: October 1, 1996

BY: Division Director
Clemency Division

DATE OF REVIEW: October 1, 1997

ACA STANDARDS:

REFERENCE/SOURCE MATERIALS: O.C.G.A. Title 42, Chapter 9, Section 2; Rules and Regulations of the State of Georgia [475-03-.05(2)]

1.101. AUTHORITY: Under the provisions of O.C.G.A. §42-9-2, management and control of the agency is vested in the Board which has responsibility to promulgate rules and regulations governing its activities.

1.102. PURPOSE: To establish the maximum possible interval, in a Life Sentence Case, between a decision to deny parole and the time at which reconsideration for parole will occur.

1.103. APPLICABILITY: This policy applies to all Life Sentence Cases eligible for parole consideration.

1.104. DEFINITIONS: As used in this document the following definitions apply: LIFE SENTENCE CASES: All cases with a controlling Life Sentence which are eligible for parole consideration inclusive of those Life Sentences for which parole was previously granted but subsequently revoked.

1.105. POLICY: It is the policy of the Board that all Life Sentence Cases denied parole may be set for reconsideration up to a maximum of eight years from the date of last denial when, in the Board's determination, it is not reasonable to expect that parole would be granted during the intervening years. Inmates set-off under this policy may receive expedited parole reviews in the event of a change in their circumstance or where the Board receives new information that would warrant a sooner review.

1.106. PROCEDURES: At the time the Members vote to deny parole in a Life Sentence Case, the Members will indicate the number of years the inmate must serve prior to being next considered.

Adopted _____
Date

_____
Garfield Hammonds, Jr.,
Chairman

_____
Bobby K. Whitworth,
Vice Chair

_____
Timothy E. Jones, Member

_____
Jim Wetherington, Member

_____
Walter S. Ray, Member

[Certificate Of Service Omitted In Printing]

[ORIGINAL DOCUMENT HANDWRITTEN]

United States District Court For
Northern District of Georgia
Atlanta, Division

Robert L. Jones Pro' se Plaintiff,	)	Civil Action No: 1:95-cv-3012-CAM
v.	)	Civil Right 28 U.S.C. § 1983
J. Wayne Garner Chairman Georgia State Board of Pardons and Paroles et al.	)	
Defendants.	)	

Brief in Support of Plaintiff Motion
For Summary Judgment

Comes Now, Robert L. Jones a pro' se Plaintiff in good faith With his Brief in Support of Motion for Summary Judgment Pursuant to Fed.R. of Civ. P. Rule # 56. "On the grounds, that there is No genuine issue as to any Material facts in dispute, for Case at bar was Affirmed in Part, Reversed in Part And remanded only on the Ex Post Facto issue. This Case Was reopen Feb. 27, (1997). With direction for Plaintiff to Complete the forms that he were Enable With And return them to the Clerk of Court Within (30) days from date of Order, so that process Could be served upon the defendants by the United State Marshal service and, "Diane Avery accepted Service for all (5) five Parties in Case at bar see, EXB. (A) Attached hereto, hereby.

This Complaint Was filed in the United States District Court For the Northern District of Georgia. November 11,

(1995) And Was dismissed As being frivolous Pursuant to 28 U.S.C. § 1915(d). However, The United States Court of Appeals (11th Cir.) denied, or Affirmed all Grouns, Except (1) one, "the Ex Post Facto Claim" in which they "Reversed" the Dismissal of the Ex Post Facto Claim faining the Claim is Not frivalous due to the holding in "Morales" Therefore, this Action is back before this Court for further Proceeding. And the United States Magistrate Judge's Richard H. Diane ordered this case reopen March 5, (1997). Plaintiff have served upon all Defendants through United State Marshal Service. In fact in light of the facts Alleged. There is no Genuine issues as to any Material facts in dispute, the moving party is entitle to Summary Judgment as a Matter of law. And pursuant to Fed.R. of Civ. P. Rule # 56(c) For the only issue to be consider Are the Ex Post Facto issue.

"HISTORY OF CASE"

Reopen Subm D.J.

Proceedings Include All Events
1:95-cv-3011, Jones v. Garner et al.

11/21/95	1.	Complaint with request to proceed in Forma Pauperis with order by Mag. Judge Richard H. Deone Jr. Granted request Service of Process Shall Not issue at Present time, [filed forwarded to State law Clerk, cc (Jan) (Entry date 11/28/95)
11/21/95	2.	Order of proceed in forma Pauperis, by Mag Judge Richard H. Deone, Jr. cc [Jan] (Entry date 12/28/95]

12/26/95	3.	Order dismissing complaint [1-1] Pursuant to 28 U.S.C. 1915(d) by Judge Charles A. Moye Jr. cc [Jan] [Entry date 12/29/95]
12/26/95	4.	Judgment Entered on In Forma Pauperis Complaint [1-1] for Dff. Against Pla. Dismissing Action Pursuant to 28 U.S.C. 1915(d) cc [Jan] (Entry 12/29/95]
1/12/96	5.	Notice of Appeal from Judgment [4-1] Order dismissing complaint [1-1] Pursuant to 28 U.S.C. 1915(d) [3-1] [3-2] by Pla filing fee Not paid [Jan] [Entry date 1/18/96]
1/18/96	--	Submitted on Notice of Appeal for in forma Pauperis determination [5-1] to Judge Charles A. Moye Jr. [Jan]
1/18/96	--	Notice of Appeal certified copy of order 12/26/95 Judgment of 12/26/95, and Certified Copy of docket to U.S. Court of Appeals Re: by Robert L. Jones for Court of Appeal [5-1] [Jan].
1/19/96	6.	Order granting Pla's Motion to appeal In Forma Pauperis [5-1] Certificate of Probable cause is denied by Judge Charles A. Moye Jr. cc/cert to U.S.C.A. [Jan] [Entry date [1/23/96] [Elect date 1/23/96]
1/31/96	--	Acknowledgement by the court of appeals Regarding Appeal U.S.C.A. dat. No. 96-8078 [RAg] [Entry date 2/1/96]

2/13/96	--	Request for Certificate of readiness from the Court of Appeals regarding Appeal U.S.C.A. 96-8078 [re] [Entry date 2/14/96]
2/14/96	--	Certificate of readiness of record on Appeal With Certified Copy of docket mailed to U.S.C.A. [1 vol of Pleadings] U.S.C.A. 96-8078 [rog]
2/23/96	--	U.S.C.A. Ack. receipt of Cor. U.S.C.A. 96-8078 [rog] [Entry date 2/26/96]
3/1/96	--	Request from U.S.C.A. for the original papers Mailed to the U.S.C.A. [1 vol of Pleadings] U.S.C.A. 96-8078 [F.b.h.]
3/11/96	--	U.S.C.A. Ack receipt of the original papers U.S.C.A. 96-8078 [rog] [Entry date 3/13/96] Docket as of April 3, 1997, 11:49, A.M. Page – 2.
4/17/96	7.	Certified Copy of order of the U.S. Court of Appeals Denying Appeal order [7-1] cc [Jan] [Entry date 4/25/96]
12/16/96	8.	Motion by Plaintiff for Appointment of Counsel With Brief in support [Jan] [Entry date 1/7/97]
12/16/96	9.	Motion by Plaintiff for Evidentry hearing [Jan] [Entry date 1/7/97]
12/16/96	10.	Motion by plaintiff for leave to file Discovery [Jan] [Entry date 1/7/97]
12/26/96	11.	Certified Copy of Judgment of U.S.C.A. Affirming in Part, and Reversed in Part Judgment of this Court Appeals U.S.C.A. dkt. 96-8078 [Jan] [Entry date 1/14/97]

4/26/96	11.	Certified Copy of Judgment of U.S.C.A. Remanded to the District Court for further Action Judgment of this Court Appeal U.S.C.A. dkt. 96-8078 [Jan] [Entry date 1/14/97]
1/8/97	--	Submitted to Judge Charles A. Boye Jr. ON [8-1] Motion for Appointment of Counsel [9-1] Motion for Evidentiary hearing [10-1] Motion for leave to file Discovery [Jan]
1/14/97	--	Submitted to Judge Charles A. Graye Jr. on [11-1] appeal Judgment [Jan]
2/11/97	12.	Order by Judge Charles Jr. to reopen case and forward to Mag. Judge Richard H. Deone Jr. for further proceeding consistent With the opinion of the U.S.C.A. for the 11th Circuit (cc) [Jan] [Entry date 2/1397]
2/11/97	--	Case Referred to Mag Judge Richard H. Deone Jr. Calend Sheets forwarded [Jan] [Entry date 2/13/97]
2/13/97	--	Submitted to Mag. Judge Richard H. Deone Jr. on [8-1] Motion for Appointment of Counsel [9-1] Motion for Evidentiary hearing [10-1] Motion for leave to filed Discovery [Jan]
2/27/97	13.	Order by Mag Judge Richard H. Deone Jr. Allowing Case to proceed as any Civil action, Direction Plaintiff to Complete service form and return to Clerk with 30 days so that process May be served upon the dets. by U.S. Marshal Service (cc) [Jan] [Entry date 3/5/97]

3/12/97	14.	Notice of request for 3 Summons Forms and 5 U.S.M. 285 Marshal forms by Plaintiff Mailed to Pla this date [Jan] [Entry date 3/18/97]
3/15/97	--	Submitted to Judge Charles A. Moye Jr. [8-1] Motion for Appointment of Counsel [9-1] Motion for Evidentiary hearing [10-1] Motion for leave to file Discovery [Jan] Docket As April 3, 1997, 11:49, A.M. page 3
3/18/97		Rec'd one completed USM Form 3. Summons from Pla Mailed Pla additional Marshal forms And Summons Placed Summons for James T Morris, and Timothy E. Jones in file Pending receipt of completed U.S.M. 285 to be forwarded to U.S. Marshal for service [Jan] [Entry date 3/31/97]
3/18/97	--	Summons issues and U.S.M. 285 prepared for service upon Defendant J. Wayne Garner Forwarded to U.S.M. with service copy of Complaint Consent form to Process before Magistrate, And Pretrial instructions [Jan] Entry date 3/31/97]
4/3/97		Completed Referral to Mag. Judge Richard H. Deone Jr. Per David Powell Law Clerk for RHD. [Jan] [Edit] date 4/3/97]

[End of P.]

"Statement of Facts"

Plaintiff contends, the facts are not in dispute On December 1, [1979] The Board of Pardons and Paroles, "the board" revise the applicable rules to require Reconsideration every (3) three years after the initial [7] seven . . . On February 1, [1985] "the board again, revised the rules allow an Eight year interval between resideration. In fact, Plaintiff Crime was Committed before revision of the rules.

However, Pursuant to the New rules, Plaintiffs Are being required to serve Eight years between Parole Consideration. . . . Plaintiff Assert, that this is a violation of the Ex Post Facto Clause . . . "Notice" That this Case was reversed and remanded back to this Court on the "Ex Post Facto issue"

"Argument And Citations of Authority"

Plaintiff Contends, that ex post Facto Prohibition forbids the Congress And the State to enact any law 'Which imposes A Punishment for An Act Which Was Not Punishable at the time the crime was committed; or imposes additional punishment to that than prescribed . . . Weaver v. Graham, Supra, At 101 S.Ct. 963 [quoting Gumming v. Missouri 71 U.S. [4 Wall] 277,325-26 18 L.Ed. 356 [1866] For a law to be considered Ex Post Facto, "It Must be retrospective, that is, it Must apply to the events occurring before its enactment, and it Must disadvantage the offender Affected by it." Id at 101. S.Ct. 964.) It has been established that the law As to Plaintiff Parole Eligibility date was Change After the date of Conviction, And that the Change Significantly extended the Amount of time

Plaintiff Must Serve before before becoming Eligible for Parole reconsideration . . . Plaintiff contends, that this extension of Parole Eligibility is a disadvantage and Constitution a Violation of the Ex Post Facto Clause. Plaintiff Rely On "Akins v. Snow, And since there is no genuine issue to any Material facts in dispute Plaintiff are entitle to Summary Judgment As A Matter of law.

In fact, this Claim involves Straightforward denial of Parole Eligibility date . . . And the Change of Eligibility for Parole Reconsideration are the key facts in this Complaint. Constitution Provides that [n]o State Shall . . . Pass Any . . . Ex Post Facto Law . . . " U.S. Const. Art. 1 § 10 Cl. 1. At the time the constitution was drafted. The Phrase, "Ex Post Facto Law," Was a term of art. With A Well Established Meaning. See, Calder v. Bull, 3 U.S. [Dall] 386,1,1 Ed. 648 [1798] Identified several Legislative Acts, that clearly implicated the core concerns of the various Ex Post Facto Clause that Existed At the Time the constitution's Framing.

One such Legislative act he Noted was "Every law that change the punishment, And inflicts a Grater Punishment than the law anneled to the Crime When Committed. Id at 390, 1, L.Ed. at 650. [opinion of Chase J]. [Emphasis in Original] However, the Supreme Court rulings has been faithful to the original Principle Ex Post Facto law. That every law that change the Punishment And inflicts a Grater Punishment than the law annexed to the Crim When Committed," violate the Ex Post Facto Provision, see, Miller v. Florida, 482 U.S. 423, 429, 107 S.Ct. 2446, 2450, 96 L.Ed.2d. 351 [1987]; Weaver v. Graham, 450 U.S. 24, 28, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 [1981]; Dobber v. Florida, 432 U.S. 282, 292, 97 S.Ct. 2290,

2298, 53 L.Ed.2d 344 [1977]. In fact, the Court Of Appeals 11th Circuit held, In Akins v. Snow, 922 F.2d. 1558 [1991] 3 Constitution law key 203, Pardons And Parole Key 60 Rules of the State Board's of Pardons And Paroles Concerning Parole Reconsideration Was the Equivalent of a "law" for Ex Post Facto Purposes O.C.G.A. § 42-9-45; Ga. Code § 77-525, U.S.C.A. Const. Art. 1 § 10, cls 1 And 4. Pardons And Parole "Key 60 States." Parole Reconsideration are a Essential Part of Parole Eligibility, O.C.G.A. 42-9-41; 42-9-42; 42-9-43; and (5) constitution law key 203 Ex Post Facto Clause applies to change in Parole Eligibility U.S. Ga. Const. art 1, § 10. Cl. 1, see Warden v. Marrero, 417 U.S. 653, 663, 94 S.Ct. 2532, 2538 41 L.Ed.2d. 383 [1974] [Citation omitted] The [11th Circuit] Predecessor Implied that parole Eligibility Previously Available is part of Prison sentence; By Stating any "official Po[s]t Sentence Action that delays Eligibility for Supervised Release run a foul of Ex Post Facto Proscription," United State Ex Rel Graham v. United States Parole Comm'n, 629 F.2d 1040, 1043 [5th Cir. 1980] Quoting Shepard v. Tayler, 556 F.2d, 648, 654, [2nd Cir. 1977]. Other Courts has Also held, "That Parole Eligibility is Part of sentence imposed as Punishment for a Crime, And therefore, subject to the prohibitions of the Ex Post Facto Clause; see, Fender v. Thompson, 883 F.2d. 303, 306, [4th Cir. 1989]. Retrospective Application of a Statute Changing Parole Eligibility Would Substantially Alter the consequences attached to the Crime Already Completed, And therefore, Change the punishment for prisoners Who Committed Crime before the Statute's Enactment; see, Schwartz v. Muncy, 834 F.2d. 396, 398, n.8. [4th Cir. 1987]; Beebe v. Phelps, 650 F.2d 774,

777 [5th Cir. Unit A 1981]; The Supreme Court's Recognized that prisoner is a significant factor concerning Parole Eligibility into both Defendant's decision to plea bargain and the Judge's Calculation of the Sentence to be imposed." Weaver v. Graham, Supra, at 101 S.Ct. 966, The Courts specifically Cited to Rodriguez v. United States Parole Commission, 594 F.2d 170, [7th Cir. 1979] Where the Elimination of Parole Eligibility was held to be Ex Post Facto Violation . . .

"Conclusion"

Plaintiff Contends, that he has Shown the Court's With respect, And in Good faith With Affidavit in Support that he is in fact Entitle to Summary Judgment As A Matter of law. For the violation that the State Board's of Pardons and Paroles inflicted upon him with thair decision . . .

Wherefore, For the Foregoing Reason Stated Within his Motion, And Affidavit Attached hereto in Support and the record on file herein, Plaintiff Are Entitle to Summary Judgment as a Matter of law.

Plaintiff Respectfully Pray that this Motion be granted in every respect And thus he will Every Pray . . .

Respectfully Submitted
/s/ Robert L. Jones
Robert L. Jones Pro' se
D020489

This 22 day of May 1997.

Re: Jones v. Garner, Civil Action No:1:95-CV-3012 CMA

"Affidavit"

Comes Now, Robert L. Jones Plaintiff, being fris duly Sworn and says:

(1) I am Presdent of Ware Contry, State of Georgia And Presently Serving Time At Ware State Prison, Waycross, Ga. 31501.

(2) On August 16-20, [1982] I was convicted by a Jury in the Superior Court of Fulton County State of Georgia Atlanta, Georgia, Sentence on the Same day to life Imprisonment Presiding Judge's Honorable Frank M. Eldridge.

(3) On December 21, [1995] I filed Civil Action In The United States District Court For the Northern District of Georgia, Atlanta Division Pursuant to 42 U.S.C. § 1983. In Which I sought Decletary Injuctive relief in the Alternative Punitive compensatory And Monetary Damages.

(4) When I were convicted August 20, [1982] Inmates Serving life sentence according to the rules of the State Board's of Pardons, And Paroles, And Pursuant to Akins v. Snow, Life sentance crime Committed between December 1, [1979] And Febuary 1, [1985] Parole Reconsideration Every (3) three years After the First Denial of Parole.

(5) I was considered For Parole August of (1989) And Denied September 29, (1989) with a (8) Eight year set-off until August of (1997) Which was inappropiated however, I filed an Application to intervene Akins v. Snow 922, F.2d. 1558; It was docket in Clerk's office January 3rd, (1991) No:1:88-2421. R.C.F. Robert L. Jones to intervene. As a result I was considered again August of (1992),

And denied September 29, (1992) with a three year set-off according to the applicable rules, until (1995). But, September 29, (1995) I was denied With instruction I would be consider Again (2003) (8) Eight year set-off, I Written the Board's Asking for a reconsideration thinking it was a Mistake And that Motion Was denied.

(6) This is an inappropriate decision Pursuant to Akins v. Snow, And Contrary to their own rules, and regulation. In which deprived Me of My rights under Color of State, and federal law, secured to Me by the United States Constitution. In fact, this case was remanded back to this Court for further Proceeding and Judge's Richard H. Deone reopen the case March 5, (1997) There is no genuine issues as to any material fact in dispute and the Moving Party are entitle to Summary Judgment As A Matter of law, And Pursuant to Fed. R. of Civ. P. Rule 56(c), Further, All issues have been denied Except the Ex Post Facto Claim Violation. And I rely on Akins v. Snow, 922, F.2d 1558 Cert. denied, 501 U.S. 1260, 111 S.Ct. 2915, 115 L.Ed.1079 (1991)

Wherefore, for the foregoing reason Stated in Complaint, Brief, And Affidavit I Am Entitle to Summary Judgment As A Matter of Law, because, the Application of the Board's New rules to My Case Effectively denieds Me Eligibility for Parole Consideration that I am Entitle to Under the rules Effected At the Crime was committed.

Respectfully Submitted
/s/ Robert L. Jones
Robert L. Jones
D020489

Dated: 5/22/97

DECLARATION UNDER PENALTY OF PERJURY

YOU MUST DECLARE UNDER PENALTY OF PERJURY THAT THE ANSWERS AND INFORMATION YOU HAVE GIVEN HEREIN ARE TRUE AND CORRECT. GIVING FALSE ANSWERS OR INFORMATION WILL SUBJECT YOU TO PERJURY CHARGES UNDER BOTH FEDERAL AND STATE LAW.

Understanding the above, I declare under penalty of perjury that the foregoing answers and information provided by me are true and correct.

Executed this 22 day of May, 1997.

/s/ Robert L. Jones
Signature of Declarant
D020489 Ware C. J.
3620 Harris Rd.
Waycross, Ga 31501

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT L. JONES, Plaintiff, v. J. WAYNE GARNER, et al., Defendants.	•	CIVIL ACTION NO. NO. 1:95-cv-3012-CAM (Filed Jun. 13, 1997)

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Come now *J. WAYNE GARNER*, former Chairman, State Board of Pardons and Paroles, *JAMES T. MORRIS*, former Chairman, State Board of Pardons and Paroles, *GARFIELD HAMMONDS, JR.*, former Chairman, State Board of Pardons and Paroles, *BOBBY K. WHITWORTH*, Member, State Board of Pardons and Paroles, and *TIMOTHY E. JONES*, former Member, State Board of Pardons and Paroles, Defendants in the above-styled action, by counsel, Thurbert E. Baker, Attorney General for the State of Georgia, and submit this their Response to Plaintiff's Motion for Summary Judgment in the above-styled action. Defendants oppose Plaintiff's Motion.

I. STATEMENT OF THE CASE

Plaintiff is a convicted felon, currently incarcerated at Ware State Prison in Waycross, Georgia, in the custody of the Georgia Department of Corrections. In his lawsuit, brought against five current and former members of the

State Board of Pardons and Paroles, Plaintiff raises a single issue (it is Defendants, understanding that all remaining issues were dismissed by the Court, pursuant to 28 U.S.C. § 1915, prior to service of process).

Plaintiff alleges that the Board's decision to defer his next reconsideration for parole for a maximum of eight years, as authorized by Georgia law, violates his ex post facto rights by adversely effecting [sic] his potential for parole. Plaintiff contends that *Akins v. Snow*, 922 F. 2d 1558 (11th Cir. *cert. denied*, 501 U.S. 1260 (1991), prohibits the application of this rule to him.

Petitioner's Motion bears a certificate of service of May 22, 1997. It was mailed on June 2, 1997, and received by the Attorney General on June 4, 1997. By coincidence, the Attorney General had been contemporaneously preparing a Motion for Summary Judgment on behalf of Defendants. That Motion was filed May 27, 1997, and is currently pending before this Court.

II. STATEMENT OF FACTS

On July 23, 1974, Plaintiff was sentenced following conviction on murder charges in the Superior Court of Fulton County. Plaintiff was sentenced to life imprisonment for the murder of Jack Bell. On November 24, 1979, Plaintiff escaped. While on escape, Plaintiff killed Frances Tutt Bell. Plaintiff was convicted of her murder and sentenced to life imprisonment, again in the Superior Court of Fulton County, on August 20, 1982.

Plaintiff was initially considered for, and denied, parole on September 29, 1989. He was scheduled for

reconsideration in August, 1997. Plaintiff was considered for a second time, and denied parole, on September 1, 1992. He was scheduled for reconsideration in August, 1995. On September 29, 1995, Plaintiff was reconsidered. He was denied parole and advised that his next reconsideration would come within eight years. Plaintiff thereupon filed suit.

III. ARGUMENT AND CITATION OF AUTHORITY

A. THE "SET-OFF" OF PLAINTIFF FOR FUTURE RECONSIDERATION OF PAROLE HAS NO MEANINGFUL EFFECT ON THE POSSIBILITY OF PAROLE FOR PLAINTIFF; THEREFORE, THE APPLICATION OF THE RULE TO PLAINTIFF DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

In Defendants' pending Motion for Summary Judgment, Defendants have extensively briefed this issue, which raises the scope of *Akins v. Snow*, 922 F. 2d 1558 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991), in light of the decision of the United States Supreme Court in *California Department of Corrections v. Morales*, ___ U.S. ___, 115 S.Ct. 1597 (1995). The Eleventh Circuit itself subsequently noted that the continued vitality of *Akins* was "questionable." *Jones v. Georgia Board of Pardons and Paroles*, 59 F.3d 1145, 1149 (11th Cir. 1995). In the interest of brevity, Defendants incorporate by reference that Brief in opposition to Plaintiff's Motion.

B. *AS TO PLAINTIFF'S CLAIMS FOR DAMAGES, DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.*

Qualified immunity since the decision of the United States Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), has been limited to an objective inquiry into the state of the law at the time the allegedly unconstitutional actions of the defendants were taken. When a defendant has asserted the defense of qualified immunity, the complaint must be dismissed unless the plaintiff can demonstrate that the legal norms allegedly violated by the defendant were clearly established at the time he acted. *Id.*, at 818. Once the defendant has invoked the defense of qualified immunity, the burden shifts to the plaintiff to demonstrate a violation of clearly established constitutional rights. *Waldrop v. Evans*, 871 F.2d 1030 (11th Cir. 1989).

In *Lassiter v. Alabama A & M University*, 28 F.3d 1146 (11th Cir. 1994) (*en banc*), the Eleventh Circuit stated that the usual rule is that qualified immunity protects government actors and that only in exceptional cases will government actors not be shielded in cases against them in their individual capacities. *Id.*, at 1149. *Lassiter* also teaches that for the law to be clearly established to the point that qualified immunity does not apply, the law must have "earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." *Id.*, at 1149.

The Court went on to state that general propositions have little to do with the concept of qualified immunity

and that if the case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant. *Id.*, at 1150.

> The line is not to be found in abstractions – to act reasonably, to act with probable cause, and so forth – but in studying how these abstractions have been applied in concrete circumstances. *Id.*, at 1150 (quoting *Barts v. Joyner*, 865 F.2d 1187, 1194 (11th Cir. 1989)).

Further, public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases. For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances. *Id.*, at 1150. Additionally, because qualified immunity is a doctrine of practical application to real-life situations, Courts should judge the acts of the government officials against the law and facts at the time Defendants acted and not by hindsight, based on later events. *Id.*, at 1150.

In the case at bar, Plaintiff relies upon *Akins v. Snow*, 922 F. 2d 1558 (11th Cir., *cert. denied*, 501 U.S. 1260 (1991). Clearly, that case supports his claim (and, considered in isolation, would require rejection of Defendants' qualified immunity defense). However, since that decision, the United States Supreme Court has decided *California Department of Corrections v. Morales*, ___ U.S. ___, 115 S.Ct. 1597 (1995). The Eleventh Circuit itself has termed the holding in *Akins* "questionable." *Jones v. Georgia Board of Pardons and Paroles*, 59 F.3d 1145, 1149 (11th Cir. 1995).

The Fourth Circuit has, in considering a similar Virginia provision in light of *Morales*, rejected the *Akins* rationale. *Hill v. Jackson*, 64 F. 3d 163, 169-70 (4th Cir. 1995). Thus, Defendants submit that their decision cannot be said to have violated clearly established law, and they are therefore entitled to qualified immunity from suit for damages.

CONCLUSION

For the above and foregoing reasons, Defendants respectfully request that this Honorable Court deny Plaintiff's Motion for Summary Judgment, grant Defendants' Motion for Summary Judgment, and enter judgment in their favor.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

MARY BETH WESTMORELAND 750150
Deputy Attorney General

/s/ Carol A. Callaway by NBC
CAROL A. CALLAWAY 104590
Senior Assistant Attorney General

/s/ Neal B. Childers
NEAL B. CHILDERS 124410
Senior Assitant Attorney General

Please serve:

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Senior Assistant Attorney General
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Atlanta, Georgia 30334-1300
(404) 656-3355

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT L. JONES, Plaintiff,	*	
v.	*	CIVIL ACTION NO. NO. 1:95-cv-3012-CAM
J. WAYNE GARNER, et al., Defendants.	*	

DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Come now *J. WAYNE GARNER*, former Chairman, State Board of Pardons and Paroles, *JAMES T. MORRIS*, former Chairman, State Board of Pardons and Paroles, *GARFIELD HAMMONDS, JR.*, former Chairman, State Board of Pardons and Paroles, *BOBBY K. WHITWORTH*, Member, State Board of Pardons and Paroles, and *TIMOTHY E. JONES*, former Member, State Board of Pardons and Paroles, Defendants in the above-styled action, by counsel, Thurbert E. Baker, Attorney General for the State of Georgia, and submit this their Response to Plaintiff's Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment.

Plaintiff has not submitted a Statement of Undisputed Material Facts to which Defendants could respond.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

MARY BETH WESTMORELAND 750150
Deputy Attorney General

/s/ Carol A. Callaway by NBC
CAROL A. CALLAWAY 104590
Senior Assistant Attorney General

/s/ Neal B. Childers
NEAL B. CHILDERS 124410
Senior Assitant Attorney General

Please serve:

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Senior Assistant Attorney General
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[Certificate Of Service Omitted In Printing]

[Original Document Handwritten]

In The United States District Court
For The Northern District Of Georgia
Atlanta Division

Robert L. Jones,	)	
	)	
Plaintiff,	)	Civil Action No:
-vs-	)	1:95-Cv-3012-C.M.A
J. Wayne Garner, ET al,	)	
	)	
Defendant's	)	

Plaintiff's Response To Defendant's
Motion For Summary Judgment

Comes Now Robert L. Jones A Proise Plaintiff In the above-style Action, And Submits his response to the Defendant's Motion For Summary Judgment In the above-style Action. Plaintiff Oppose Defendant's Motion For Summary Judgment, And States the Following To-Wit:

In Defendant's "Statement of Facts," No. 1, AN 2 He Would Admitt Too;

However, No. 3, P. 4 Defendant's agree, that the "Set-off" Of Plaintiff For Furture Reconsideration For Parole has No Meaningful Effect on the Possibility of Parole for Plaintiff appreciation of the rules to Plaintiff does not Violate the Expost Facto Clause.

Plaintiff Contends, that the Defendant's Must have had Over Looked the case "Calder V. Bull" When he Cited "Morales". The Constitution provides that "[n]o state shall . . . Pass any . . . Expost Facto Law . . . " U.S. Const.

Art. 1. § 10, cl.1. at the time the Constitution was drafted, the Phrass "Expost Facto" Was a Term of art With a Well-Established Meaning. SEE Calder V. Bull, 3 U.S. [Dall] 386, 1 L.Ed. 648 [1798]. Justice Chase's Opinion In Calder V. Bull 3 U.S. [Dall] 386, 1 L.Ed. 648, [1798]. Identified Several Legisintive Acts that clearly Implicated the core concerns of the Various Expost Facto Clauses That Existed at the time of the Constitutions Framing, ONE Such Legislative Act he Noted Was: "Every Law That Changes The Punishment, and Inflicts a greater punishment, than the Law Annexed to the Crime When Committed." Id. at 390.1 L.Ed. at 650, [opinion] of Chase J.] [Emphasis in original] The Supreme Courts Expost Facto rulings has been Faithful to the Original principle that, "Every Law that Changes the Punishment, and Inflicts a Grater Punishment than the Law Annexed to the Crime When Committed," Violates the Expost Facto Provision. SEE, Miller V. Florida, 482, U.S. 423, 429, 107 S.Ct. 2446, 2450, 96, L.Ed.2d. 351. [1987]; Weaver V. Graham, 450 U.S. 24, 28, 101, Sct. 960, 964, 67, L.Ed.2d. 17, [1981]; Dabbert V. Florida, 432 U.S. 282, 292, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 [1977]; Etc. In Fact, Morales Case Is Misplaced To Case at Bar, In Cal! Fornia V. Morales Dept of Corrections, U.S. 115 Sct. 1597, 131 L.Ed.2d. 588, [1995] This case is wholely Indistinguishable from the Legislation of the Issue at Bar. California has a Suitability parole parole status, Georgia dose not . . . California Parole Statues. § 3041.5.[6][2], Cal. Penal. Code, Ann. § [190 West. 1982] In which this Amendment is Left Unchanged. Of the Substantive formula for securing and reduction to the sentencing raining. In fact this decision was handed down In Morales Case, during the pendency of his case,

In which Respondent Appealed before the Board for his Suitability Hearing, and the Board found that Morales Was Unsuitable for "1992" Parole, and gave him a Set-off until "1995" Just (3) three years. SEE, In Morales Case, Post at. 1607, 1608, states As follows:

We express no view as to the Constitution-ality of any of a Members of other statutes that Might Alter the timing of parole hearing, the Circumstances difference from those present here. Pursuant to Cal. Penal, Code ANN. § 3041, 5, [6][2] West [1992]; Title 15, Cal. Code of regulation § 2050 [1994] this Case is Misplaced according to Akins V. Snow, 922, F.2d. 1558 [11th Cir.1991] 3 Constitution Law KEY 203; Pardons And Parole KEY 60 Rules of State Board of Pardon And Parole. Concerning Parole Reconsideration was the equivalent of a "Law" for Expost Facto purposes.

The Conclusion that a Parole Reconsideration hearing Is An Essential part of parole Eligibility under Georgias' parole System Is Supported by the Language of the statuts delegating to the Board the Power to Enact Rules, and Regulations Concerning Parole.

This statute provides that [s]uch rules and regulations shall contain as eligibility requirement for parole which shall set forth the time when the Automatic Initial Consideration of Inmates . . . Shall take place." Ga. Code ANN. § 77-525 Harrison 1969] SEE, also, Ga. Code ANN. § 42-9-45.

Further, In Defendants' Motion for Summary Judgment, on Page(6) Defendants' are Trying to mislead the Courts, with alleging allegations that cannot be Supported by the

records "Quote," In Plaintiff's case. He has been convicted of Multiple Capital Felonies [Tow Courts of Murder] In Georgia, Including ONE Murder Committed after having Escaps from custody, "Unqote". Plaintiff Contends there is Nothing in the records which Will support Such Statements, there is No where in the record that Plaintiff has been Convicted for an escape, Howere Plaintiff Went to Court for an Escape in Birmingham, Ala, (11) years before He ever entered Georgia and was found Not Guilty. Further Defendants' Lied about Plaintiff having a Significant history of Violance, In Fact Nothing Could be No Further From the Truth. In Fact, if the aligations Made by the Defendants' Was So; Than why are the Exhibits Not Attached to their Motion? The only Exhibit Attached was an Affadivit by Williams F. Amideo, "And the denial of the Plaintiffs' Parole, And the State Board Of Pardons And Paroles" Board Policy Statement. In Fact, Plaintiff has Never had access to these Polices.

However, these Polices Was Not Changed Until Michael J. Bowers, Attorney General, Assistant, Attorney General," Terry L. Long; Addressed A Letter May 16, 1995, to Mr. Christopher Hamilton, Director, Legal Services. State Board Of Pardons And Parole, RE; To California Department of Correction V. Morales, U.S. Supreme Court Decision. In Which Mr. Long Stated in his letter, page (2) pargraph (3), Stated the Morales decision attempts to Limit its holding to the facts of the Case. Was Worth Nothing . . . Further, Mr. Long stated that an Eight year Set-off Could Not Legally be distinqushed from the Law under Consideration In Morales . . . Thereafter, J. Wayne Garner; Chairman of the State Board of Pardons And Parole. June 12, 1995. Addressed to the Board . . . Thru:

Charles J. Topetzes; From: Wayne Daniel.. RE: Lifer Reconsideration Intervals Morales Decision. Recommending, that all the Members adopt a uniform Potential Set-off Maximun of (8) years in all Cases); (Including Initial Consideration, and Reconsideration) And for the policy to become Effective Immediately, In fact, all Members agree to a policy of a Set-off period of one to eight years In all Life Sentence Cases.

SEE Attached hereto, a two page Letter; to Mr. Christopher Hamilton, as (exhibit-A) also SEE (Exhibit-b) a Letter From Wayne Daniel. To the Boards' and (Exhibit-C) the Policy Attached hereto, hereby.

Plaintiff Contends, that the Court Can plainly See the disrespected that the State Boards of Pardons and Paroles has for the "Law" In Which the Georgia Legisiature has delegated to the Board the Authority to Enact "Rules and Regulations" Concerning Parole. Ga. Code ANN § 77-525, [Harrison 1969]; Ga. Code ANN § 42-9-45 [1989]. However This delegation Mandates that the Boards' rules and regulations "Contained an Eligibility requirement, and since the Boards' have this power, the rules, or regulation Enacted by the Board are subject to the Expost Facto Clause's; Prohibitions, Defendants', are trying to Mislead the Courts Conclusively Knowing that they All Named Defendants' Were Violating Constitutions Laws of Pardon and Parole. [Key 60], And the rules of State Board of Pardons, And Paroles Concerning Parole Reconsideration Was the Equivalent of a "Law" for Expost Facto purposes.

O.C.G.A. § 42-9-45; Ga. Code, § 77-525; U.S.C.A. Const. Art. 1, § 10, Cl.1, In fact, Constitution [Law Key 60] States

as follows: Parole Reconsideration hearing are essential part of Parole Eligibility. O.C.G.A. §§ 42-9-41; 42-9-42; 42-9-43 and Constitutional [Law Key 203] Ex-Post Facto Clause applies to Change In Parole Eligibility, U.S.C.A. Const. art. 7, § 10, Cl.1, And to Applie this Law retrospective Court Must Look to date Where Crime Was Committed, And this Enactment put the Plaintiff at a-Grate disadvantage; And this "Deprivation of All Opportunity to be released on Parole . . . Comes Within the Scope of [the] Clause" The Key Factor In This Case Is The Change In The Eligibility date. Is the Eligibility date for Parole Consideration protected by Expost Facto Prohibition? The Ruling of this Circuit of other Circuits and of Supreme Court Answer in the Affirmative.

In Conclusion

According to Defendants' Motion for Summary Judgment; there is no Expost Facto Prohibition Against Retrospective Changes In a Prisoner's Eligibility date. Conceivably, the Board Could at any time Amend it's rules to require a Life Sentence Inmate To Serve (50) Fifty years without Consideration, And Apply this rule to all Inmates Serving Life Sentence.

Indeed, the Board Could, at whim, Length to the Extend of Effectively Voiding, All Prisoners' Eligibility dates, "Like they are doing" Without Running Afoul of the Expost Facto Prohibition . . .

Wherefore, for the foregoing reason stated Within the Plaintiff's response to Defendant's Motion for Summary Judgment, Accordingly, Plaintiff Respectfully Prays that this Honorable Court apple the Correct Law to this Issue,

And deny Defendant's Motion for Summary Judgment. And Enter Judgment In Plaintiff's. For Plaintiff is entitled To Judgment In His Favor as a Matter of Law, And thus, He Will Ever Pray . . .

Dated this 3rd Day of July 1997

Respectfully Submitted
/s/ Robert L. Jones
Plaintiff,

c/c

[Certificate Of Service Omitted In Printing]

475-3-.05 Parole Consideration. Amended.

(1) Consideration is automatic for all offenders serving sentences imposed by a court of this State and who are in the custody of the Department of Offender Rehabilitation. No application is required. Inmates serving misdemeanor county sentences of sufficient duration to make them meet the time-served requirements of Rule 475-3-.06(1) will be considered upon submission of a request to the Board. The request may be in any written form and must contain name under which convicted, where incarcerated, offense(s), date and court of conviction, and length of sentence(s). The request should be submitted as early as possible to allow enough time for necessary investigations.

(2) Reconsideration of those inmates who have been denied parole shall take place at least every three years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possibly discouraging diagnostic opinions.

(3) Inmates who have escaped will not be considered for parole until their return to custody of penal authorities of this State. If initial parole consideration was given prior to the escape, the next consideration will be scheduled for one to three years after recapture.

(4) A person who is returned to prison because of violation of the conditions of parole or other conditional release will be scheduled for parole consideration one to three years after revocation unless the Board directs otherwise in its order of revocation, votes to consider the case earlier, or unless a new sentence supersedes the

revoked sentence for the purpose of computing parole eligibility.

(5) When considering a case for parole, the Board will apply Parole Decision Guidelines. The Guidelines will take into account the inmate's crime severity level and his likelihood of success on parole. Parole success factors significantly associated with successful parolees will be tabulated from the inmate's criminal and social history. A third element for consideration will be the inmate's behavior in prison. The Board will follow the Guidelines in all parole cases except life-sentence cases to arrive at its decision or, for a specific and stated reason, may depart from the Guidelines. After the Board notifies the inmate of the decision, he may appeal the decision, but he must do so within 30 days. The basis for an appeal must be limited to the assessment of the crime severity level or to the computation of the parole success likelihood score. The inmate should address his appeal to the Appeals Officer in the Board's central office.

Authority Ga. L. 1943, pp. 185, 194: Ga. L. 1964, pp. 487-489. **Administrative History.** Original Rule entitled "Parole Consideration" was filed and effective on January 7, 1970. **Amended:** Rule repealed and a new Rule of the same title adopted. Filed October 8, 1971: effective October 28, 1971. **Amended:** Filed January 20, 1972: effective February 9, 1972. **Amended:** Filed January 8, 1974; effective January 28, 1974. **Amended:** Filed June 30, 1976: effective July 20, 1976. **Amended:** Filed March 15, 1979; effective April 4, 1979. **Amended:** Filed November 8, 1979; effective December 1, 1979, as specified by the Agency.

475-3-.05 Parole Consideration. Amended.

(1) Consideration is automatic for all offenders serving sentences imposed by a court of this State and who are in the custody of the Department of Corrections, **except that no parole consideration shall ever be given to offenders serving sentences of life imprisonment without parole.** No application is required. Persons ordered to serve consecutive county misdemeanor confinement sentences exceeding 12 months must request consideration. The request may be in any written form and must contain name under which convicted, where incarcerated, offense(s), date and court of conviction, and length of sentence(s). The request should be submitted as early as possible to allow enough time for necessary investigations.

(2) Reconsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possible discouraging diagnostic opinions.

(3) Inmates who have escaped will not be considered for parole until their return to custody of penal authorities of this State. If initial parole consideration was given prior to the escape of a life sentence inmate, the next consideration will be scheduled for one to eight years after recapture.

(4) A person who is returned to prison because of violation of the conditions of parole or other conditional release will be scheduled for parole consideration six months to one year after revocation unless the Board

directs otherwise in its order of revocation, votes to consider the case earlier, or unless a new sentence supersedes the revoked sentence for the purpose of computing parole eligibility.

(5) In considering parole for persons who will becomes statutorily eligible for parole consideration and who are serving less than a life sentence, the Board shall review a recommendation as to months to serve. This recommendation will be obtained from the Parole Decision Guidelines system which accounts for the severity of the crime and the inmate's likelihood of success on parole. The inmate's likelihood of success on parole is measured by weighted factors concerning the inmate's criminal and social history which the Board has found to have value in predicting the probability of further criminal behavior and successful adjustment under parole supervision. The Parole Decision Guidelines system is an aid to the Board in making more consistent, soundly based and explainable parole decisions and does not create a liberty interest. The Board specifically reserves the right to exercise its discretion under Georgia Law to disagree with the recommendation resulting from application of the Parole Decision Guidelines and may make an independent decision to deny parole or establish a Tentative Parole Month at any time prior to sentence expiration. After the Board notifies the inmate of their decision, the inmate may contest either the Crime Severity Level or Parole Success Factor scores by writing within 30 days the Parole Guidelines Director in the Board's Central Office. Prior to an inmate being paroled the inmate's institutional conduct will be reviewed and institutional misconduct may result in a delay in parole

release or a decision to deny parole. Any decision rendered under the Parole Decision Guidelines may be changed at the discretion of the Board at any time. The Board may modify any part of the Parole Decision Guidelines system at any time.

Authority Ga. L. 1943, pp. 185, 194; Ga. L. 1964, pp. 487-498; Ga. L. 1983, pp. 523-524; Ga. L. 1993, pp. 1654-1660. History, Original Rule entitled "Parole Consideration" was filed and effective on January 7, 1970. Amended: Rule repealed and a new Rule of same title adopted. Filed October 8, 1971; effective October 28, 1971. Amended: Filed January 20, 1972; effective February 9, 1972. Amended: Filed January 8, 1974; effective January 28, 1974. Amended: Filed June 30, 1976; effective July 20, 1976. Amended: Filed March 15, 1979; effective April 4, 1979. Amended: Filed November 8, 1979; effective December 1, 1979, as specified by the Agency. Amended: Rule repealed and a new Rule of same title adopted. Filed November 21, 1983; effective December 11, 1983. Amended: Filed January 7, 1985; effective February 1, 1985, as specified by the Agency. Amended: Filed April 29, 1985; effective May 19, 1985. Amended: F. Aug. 23, 1993; eff. Sept. 12, 1993.

Supreme Court, U.S.
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No. 99-137

In The

Supreme Court of the United States

J. WAYNE GARNER, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, JAMES T. MORRIS, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, GARFIELD HAMMONDS, JR., former Chairman of the State Board of Pardons and Paroles of the State of Georgia; BOBBY K. WHITWORTH, Member of the State Board of Pardons and Paroles of the State of Georgia, and TIMOTHY E. JONES, former Member of the State Board of Pardons and Paroles of the State of Georgia,

Petitioners,

v.

ROBERT L. JONES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

Georgia's State Board of Pardons and Paroles is constitutionally and statutorily created. The Board is vested with the power of executive clemency and has the power to grant reprieves, pardons, and paroles. Both the Supreme Court of Georgia and the United States Court of Appeals for the Eleventh Circuit have surveyed the relevant Georgia statutory and constitutional provisions and concluded that the Board, exercises "virtually unfettered discretion" with its clemency power.

The questions presented are:

1. Whether the Ex Post Facto Clause of the United States Constitution bars Georgia from applying its regulation governing the reconsideration schedule for life-sentenced inmates who have been denied parole, when the regulation has no effect on the sentence imposed, the substantive formula for consideration for parole, or the determination of eligibility for parole, or whether the change creates only "the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment."

2. Whether the decision below conflicts with the decisions of other United States courts of appeals and the appellate courts of the several states as to the meaning and import of this Court's decisions in *California Department of Corrections v. Morales* and *Lynce v. Mathis.*

PARTIES BELOW

The parties to the proceeding in the Eleventh Circuit Court of Appeals and in the District Court were as listed in the caption. For purposes of Respondent's claims for declaratory and injunctive relief, pursuant to Fed. R. Civ. P. 25(d) of the Federal Rules of Civil Procedure, the Petitioners are Walter S. Ray, Chairman, Bobby K. Whitworth, Garfield Hammonds, Jr., Dr. Betty Ann Cook, and Dr. Eugene P. Walker, the current members of the Georgia Board of Pardons and Paroles.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND OTHER PROVISIONS 1

STATEMENT OF THE CASE 2

A. FACTUAL BACKGROUND 3

B. PROCEDURAL BACKGROUND 4

C. PROCEEDINGS BELOW 8

SUMMARY OF THE ARGUMENT 9

ARGUMENT 11

I. GEORGIA'S APPLICATION OF ITS AMENDED REGULATION GOVERNING THE RECONSIDERATION SCHEDULE OF LIFE-SENTENCED INMATES WHO HAVE BEEN PREVIOUSLY DENIED PAROLE DOES NOT VIOLATE THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION 11

A. GEORGIA'S PAROLE BOARD IS INVESTED WITH BROAD AUTONOMY AND DISCRETION 14

TABLE OF CONTENTS – Continued

Page

B. A CORRECT APPLICATION OF THIS COURT'S PRECEDENTS DEMONSTRATES THAT GEORGIA'S PAROLE RECONSIDERATION SCHEME DOES NOT VIOLATE THE EX POST FACTO CLAUSE 17

C. THE ELEVENTH CIRCUIT'S ANALYSIS OF GEORGIA'S PAROLE RECONSIDERATION SCHEME WAS ERRONEOUS AND MISAPPLIED THIS COURT'S CLEAR PRECEDENTS 21

II. THE ELEVENTH CIRCUIT ERRONEOUSLY PLACED THE BURDEN OF PROOF UPON THE PETITIONERS CONTRARY TO THIS COURT'S CLEAR DIRECTIVE IN *MORALES* 29

CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991), *cert. denied*, 501 U.S. 1260 (1991) 7, 21, 22, 24, 30

Beazell v. Ohio, 269 U.S. 167 (1925) 12, 13

Brantley v. Thompson, 216 Ga. 164, 115 S.E.2d 533 (1960) 27

Calder v. Bull, 3 Dall. 386 (1798) 11, 12, 13

California Department of Corrections v. Morales, 514 U.S. 499 (1995) ..... *passim*

Collins v. Youngblood, 497 U.S. 37 (1990) .. 11, 12, 13, 30

Doe, ex dem. Truluck, et al. v. Peeples, 1 Ga. 1 (1846) 27

Fletcher v. Williams, 179 Ill. 2d 225 (1997) 18

Furnari v. Savaras, 914 P.2d 508 (Colo. 1996) 18

Hill v. Jackson, 64 F.3d 163 (4th Cir. 1995) 18, 28

Jarrett v. City of Boston, 209 Ga. 530, 74 S.E. 530 (1953) 27

Johnson v. Gomez, 92 F.3d 964 (9th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997) 31

Jones v. Garner, 164 F.3d 589 (11th Cir. 1999) .... *passim*

Jones v. Georgia State Board of Pardons and Paroles, 59 F.3d 1145 (11th Cir. 1995) 5, 14

Jones v. State, 234 Ga. 108, 214 S.E.2d 544 (1975) 3

Jones v. State, 251 Ga. 361, 306 S.E.2d 265 (1983) 3

Jordan v. Tennessee Board of Paroles, 1997 Tenn. App. LEXIS 27 18

TABLE OF AUTHORITIES – Continued

Page

Kirk v. State, 73 Ga. 620 (1884) 27

Lynce v. Mathis, 519 U.S. 433 (1997) ..... *passim*

Miller v. Florida, 482 U.S. 423 (1987) 12

Roller v. Gunn, 107 F.3d 227 (4th Cir. 1997), *cert. denied*, 522 U.S. 874 (1997) 18, 28, 31

Shabazz v. Gabry, 123 F.3d 909 (6th Cir.), *cert. denied*, 522 U.S. 1019 (1997) 18, 21, 22, 26

Sultenfuss v. Snow, 35 F.3d 1494 (11th Cir.), *cert. denied*, 523 U.S. 1191 (1995) 14, 24, 27

Tackitt v. Prudential Ins. Co., 758 F.2d 1572 (11th Cir. 1985) 29

Tuff v. State, 732 So. 2d 461 (Fla. 1990) 18

Vargas v. Morris, 266 Ga. 141, 465 S.E.2d 275, *cert. denied sub nom. Vargas v. Garner*, 517 U.S. 1108 (1996) 5

STATUTES

42 U.S.C. § 1983 8

Fed. R. Civ. P. 25(d) ii

1994 Ga. Laws 1959 3

Ga. Code Ann. § 42-9-1 ..... 5, 14

Ga. Code Ann. § 42-9-20 5

Ga. Code Ann. § 42-9-40(a) 2

Ga. Code Ann. § 42-9-45(a) 6, 15

Ga. Code Ann. § 42-9-45(f) 6

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

Ga. Comp. R. & Regs. r. 475-3-.05 ..... 1, 2, 6, 7, 15, 25

Ga. Comp. R. & Regs. r. 475-3-.06 ..... 6, 7

CONSTITUTIONAL PROVISIONS

Ga. Const. Art. IV, § 2, ¶ 2(a) 4

Ga. Const. Art. IV, § 2, ¶ 2 14

U.S. Const. Art. I, § 10 ..... 1, 9, 11

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Jones v. Garner*, 164 F.3d 589 (11th Cir. 1999), and is printed and included in the appendix to the petition for a writ of certiorari ("Pet. App. ___"). *See* Pet. App. A, 1a. The order on the merits by the United States District Court for the Northern District of Georgia, No., 1:95-CV-3012-CAM (August 25, 1997) is unreported. *See* Pet. App. B, 20a.

JURISDICTION

The Eleventh Circuit entered its opinion and judgment on January 6, 1999 (Pet. App. A, 1a) and entered its denial of Petitioners' Motion for Rehearing and Suggestion of Rehearing En Banc on April 19, 1999 (Pet. App. C, 30a). The petition for writ of certiorari was filed on July 19, 1999, and this Court granted the petition on September 28, 1999.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED IN THE CASE

U.S. Const. Art. I, § 10:

No State shall . . . pass any . . . ex post facto Law . . .

Ga. Comp. R. & Regs. r. 475-3-.05(2) (***effective December 1, 1979***) (*now superceded*):

Reconsideration of those inmates who have been denied parole shall take place at least

every three years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possibly discouraging diagnostic opinions. (Text set out fully at J.A. 86-87).

Ga. Comp. R. & Regs. r. 475-3-.05(2)
(***effective September 12, 1993***) (*presently in effect*):

Reconsideration of those inmates who have been denied parole shall take place at least every eight years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possibly discouraging diagnostic opinions. (Text set out fully at J.A. 88-90).

STATEMENT OF THE CASE

This case stems from a change in the manner in which Georgia's Board of Pardons and Paroles ("Board") reconsiders life-sentenced inmates for parole after an initial denial of parole by the Board. No inmates in Georgia are ever entitled to parole. Life-sentenced inmates are in a unique class because they are *never* given a tentative parole month. The Board is required according to regulations adopted pursuant to Ga. Code Ann. § 42-9-40(a) to initially review life-sentenced inmates for parole after they have served a fixed number of years.

Thus, no issue regarding parole eligibility arises herein. Rather, Respondent Jones complains about a

change in the Board's regulations allowing them to *reconsider* him for parole less frequently after the Board initially denied him parole and denied him on reconsideration twice subsequently.

In the eighties and nineties, many offenders, who had committed heinous crimes that would have resulted in the imposition of the death penalty in the past, received life sentences and subsequently became statutorily eligible for parole. Thereafter, the Board amended its rules to decrease the frequency of mandatory reconsideration after an initial denial of parole in an effort to conserve and better utilize its finite resources for the review of other inmates who had a realistic likelihood of parole. Similarly, the Georgia General Assembly enacted the "Sentence Reform Act of 1994" to statutorily address this concern. 1994 Ga. Laws 1959. A review of the underlying facts and an explanation of the Board's structure provide the backdrop for the legal issues presented.

A. Factual Background

In the parole reconsideration process, the severity of the offense and prior criminal history are factors considered by the Board. Thus, the facts of the underlying crimes are significant. Respondent, Robert L. Jones, has been convicted of two separate murders. *See Jones v. State*, 234 Ga. 108, 214 S.E.2d 544 (1975); *Jones v. State*, 251 Ga. 361, 306 S.E.2d 265 (1983). At the time of the first murder, the victim, Jack Bell, lived in the same rooming house where Jones resided. *Id.* Jones gained entry to Bell's bedroom and "began cursing loudly" until Bell awoke. *Id.*

Jones demanded his car on which Bell had made repairs. Bell asked Jones to pay the $58.00 for the repairs, and, in response, Jones "raised a shotgun and shot the victim as he lay in the bed." *Id.* Jones was sentenced to life in prison after his conviction for this murder July 23, 1974. (J.A. 48). On November 24, 1979, Jones escaped from custody. (J.A. 48).

On March 26, 1982, Jones murdered his second victim, Frances Tutt Davis, who was a stranger to Jones. *Jones*, 251 Ga. at 361, 306 S.E.2d at 266. That afternoon, Ms. Davis was waiting to board a train in downtown Atlanta when Jones stabbed her to death with an ice pick. *Id.* Jones fled the scene, "leaving the ice pick embedded" in Ms. Davis' chest. *Id.* Jones was convicted of the murder of Ms. Davis and was sentenced to a second term of life imprisonment on August 20, 1982. (J.A. 48).

Respondent was initially considered for, and denied, parole in September 1989. (J.A. 48). He was reconsidered, and again denied, in September 1992. (J.A. 49). Respondent was considered a third time, and again denied parole, in September 1995. (J.A. 49). At that time, Respondent was advised that his next reconsideration would come within the next eight years. (J.A. 49).

B. Procedural Background

Unlike most states, Georgia's Board is vested with "the power of executive clemency, including the power to grant reprieves, pardons, and paroles; to commute penalties; to remove disabilities imposed by law; and to remit any part of a sentence for any offense against the state after conviction." Ga. Const. Art. IV, § 2, ¶ 2(a). Both the

Supreme Court of Georgia and the United States Court of Appeals for the Eleventh Circuit have surveyed the relevant Georgia statutory and constitutional provisions and have concluded that the Board, in its exercise of clemency power has "virtually unfettered discretion." *Jones v. Georgia State Board of Pardons and Paroles*, 59 F.3d 1145, 1150 (11th Cir. 1995); *see also Vargas v. Morris*, 266 Ga. 141, 465 S.E.2d 275, *cert. denied sub nom. Vargas v. Garner*, 517 U.S. 1108 (1996).

Georgia's Board operates independently of the executive and judicial branches of government, and the General Assembly's statutorily articulated legislative policy is:

> In recognition of the doctrine contained in the Constitution of this state requiring the three branches of government to be separate, it is declared to be the policy of the General Assembly that the duties, powers, and function of the State Board of Pardons and Paroles are executive in character and that in the performance of its duties under this chapter, no other body is authorized to usurp or substitute its functions imposed by this chapter upon the board.

Ga. Code Ann. § 42-9-1. The Board is statutorily charged with "the duty of determining which inmates serving sentences imposed by a court of this state may be released on pardon and parole and fixing the time and conditions thereof." Ga. Code Ann. § 42-9-20. The Board must personally "study the cases of those inmates whom the board has the power to consider so as to determine their ultimate fitness for such relief as the board has power to grant." *Id.* Except as otherwise provided by law,

inmates serving sentences of life imprisonment become statutorily eligible for the exercise of the Board's powers after the service of seven years' imprisonment. Ga. Code Ann. § 42-9-45(f). The Board is authorized to provide, by regulation, for eligibility for reconsideration of those inmates previously denied parole. Ga. Code Ann. § 42-9-45(a).

So that it could effectively exercise its considerable discretion, the Board promulgated rules and established policies with regard to the parole consideration process. Ga. Comp. R. & Regs. r. 475-3-.06 ("An inmate serving a life sentence, for which parole is authorized by law is automatically considered for parole on the date permitted by applicable constitutional and statutory law."), and Ga. Comp. R. & Regs. r. 475-3-.05 ("Reconsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years."). Once parole is denied to a life-sentenced inmate, the Board's reconsideration policy is based upon its Rules and its policy statement regarding the "Interval for Reconsideration of Parole Denials in Life Sentence Cases," which provides that:

> All Life Sentence Cases denied parole may be set for reconsideration up to a maximum of eight years from the date of last denial when, in the Board's determination, it is not reasonable to expect that parole would be granted during the intervening years. Inmates set-off under this policy may receive expedited parole reviews in the event of a change in their circumstances or where the Board receives new information that would warrant a sooner review.

Board Policy Statement No. 4.110. (J.A. 55-7).

Prisoners convicted of crimes committed prior to the implementation of this policy challenged the application to them of the eight-year set off, and the United States Court of Appeals for the Eleventh Circuit found that the retroactive application of the amended regulation violated the Ex Post Facto Clause. *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991). Thus, the Board amended its practices accordingly. (J.A. 49).

Subsequent to this Court's decision in *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), and based upon advice from the Attorney General of Georgia that the *Morales* decision effectively overruled the Eleventh Circuit's holding in *Akins*, the Board resumed retroactive application of its amended regulation. (J.A. 49).

When the Respondent committed his second murder in 1982, the pertinent Board rule with regard to "Time-Served Requirements for Parole Consideration" provided:

> Persons serving felony sentences or combination felony and misdemeanor sentences of twenty-one or more years, including a life sentence, are eligible for parole consideration upon completion of the service of seven years.

Ga. Comp. R. & Regs. r. 475-3-.06(3). With regard to parole reconsideration, the rules provided in pertinent part, "Reconsideration of those inmates who have been denied parole shall take place at least every three years." Ga. Comp. R. & Regs. r. 475-3-.05(2). In 1985, and, again in 1993, Rule 475-3-.05(2) was amended to increase the maximum period for reconsideration of life-sentenced

inmates from three to eight years. The Respondent challenges the application of this "eight-year rule" to his two sentences of life imprisonment.

C. Proceedings Below

After being advised that his parole reconsideration was being set-off for eight years by the Board, Respondent initiated suit under 42 U.S.C. § 1983 alleging that the retroactive application of the amendment violated the Ex Post Facto Clause of the United States Constitution. Respondent sought damages, as well as a declaratory judgment that the application of the amended regulation in his case violated the Ex Post Facto Clause.

Following a period of discovery, the parties filed cross-motions for summary judgment. The District Court granted summary judgment to the Board, finding that, as in *Morales*, the amended regulation "creates 'only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment.' " (Pet. App. 27a).

On appeal, a panel of the Eleventh Circuit reversed and remanded. As a factual matter, the Circuit Court found that "Eight years is a long time." *Jones v. Garner*, 164 F.3d at 595. Also, the Circuit Court held that this "Court's reasoning in *Morales* and *Lynce [v. Mathis*, 519 U.S. 433 (1997)] reaffirms the correctness of our holding in [*Akins*]." *Id.* at 596. Finally, the Eleventh Circuit found that "there is a 'sufficient risk' that the amended Georgia regulation would 'increase the measure of punishment.' " The Circuit Court reversed the grant of summary judgment to the Board and remanded the case to the District

Court. The Eleventh Circuit subsequently denied the Board's Motion for Rehearing with Suggestion for Rehearing En Banc.

SUMMARY OF ARGUMENT

The United States Constitution forbids the states from passing ex post facto laws. Art. I, § 10, ¶ 1. In order to establish that a regulation is an ex post facto law, one must show that the "change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *California Department of Corrections v. Morales*, 514 U.S. 499, 507, n. 3 (1995). It is not sufficient to merely demonstrate "disadvantage" from the retroactive application. Moreover, such showing cannot be "speculative or attenuated [*Id.*, at 508-9]," but must rather demonstrate "with . . . certainty that the amended statutory scheme [is] more onerous than that at the time of the crime." *Lynce v. Mathis*, 519 U.S. 433, 446, n. 16 (1997).

Respondent challenged the application to him of an amendment to Georgia's parole reconsideration requirements for life sentenced inmates which allows the Board to "set-off" the parole reconsideration date of an inmate who has been initially denied parole for up to eight years, instead of the previous three years. The Regulation has no effect upon any inmate's parole eligibility, or upon the discretion of the Board as to whether it ever grants parole to life-sentenced inmates.

Under Georgia's parole system, life sentenced inmates have no expectation of parole, as it is the Board alone which ultimately determines whether they are ever

released from confinement. No other entity within Georgia's government is constitutionally permitted to interfere with the exercise of the Board's discretion in determining whether to grant parole to inmates within its jurisdiction.

The Eleventh Circuit's holding in the case below that the instant regulation is an ex post facto law is erroneous. Underlying this erroneous ruling is the fallacious assumption by the lower court that more frequent mandatory parole reconsideration ultimately leads to earlier release from confinement. This assumption ignores the reality that Georgia's Parole Board retains the ultimate authority to decide whether Jones is ever paroled.

Thus, the Circuit Court misapplied this Court's rulings in *Morales* and *Lynce* by employing a perfunctory application of the factors examined by this Court in *Morales*, rather than focusing on the ultimate effect of whether the retroactive application "constitutes a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.' " *Morales*, 514 U.S. at 509. Moreover, the Circuit Court erred in placing the burden of proof upon the Board.

Had the Eleventh Circuit focused upon the question of whether it could be shown, beyond mere speculation, that Jones' sentences were increased by this retroactive change, it could not have reached its erroneous conclusion. Those errors require this Court to reverse the decision of the Eleventh Circuit. Additionally, the record, statutes and other authorities available demonstrate that

the District Court's grant of summary judgment to the Board was, indeed, correct.

ARGUMENT

I. GEORGIA'S APPLICATION OF ITS AMENDED REGULATION GOVERNING THE RECONSIDERATION SCHEDULE OF LIFE-SENTENCED INMATES WHO HAVE BEEN DENIED PAROLE DOES NOT VIOLATE THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

Article I, § 10 of the United States Constitution forbids the several states from passing any "ex post facto" law. Art. I, § 10, ¶ 1. "Although the Latin phrase 'ex post facto' literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them [cits. omitted]." *Collins v. Youngblood*, 497 U.S. 37, 41 (1990).

In his now-famous opinion in *Calder v. Bull*, 3 Dall. 386 (1798), Justice Chase described four categories of ex post facto laws:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence,

> and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Id. at 390.

This venerated exposition on what comprises ex post facto laws is still consistently cited by this Court as a cornerstone of its ex post facto jurisprudence. *See*, e.g., *Miller v. Florida*, 482 U.S. 423 (1987); *Collins v. Youngblood*, 497 U.S. 37 (1990); *Morales*, 514 U.S. 499 (1995); *Lynce v. Mathis*, 519 U.S. 433 (1997). Likewise, this Court's explanation of ex post facto laws in *Beazell v. Ohio*, 269 U.S. 167 (1925), has been characterized as a "formulation . . . faithful to our best knowledge of the original understanding of the Ex Post Facto Clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. at 43-44.

In *Collins*, this Court removed from the ex post facto lexicon the "procedural" versus "substantive" distinction which the Court noted had "imported confusion into the interpretation of the Ex Post Facto Clause." *Id.* at 45. In its place, this Court directed that the aforementioned *Calder* and *Beazell* definitions be used in analyzing alleged ex post facto laws. *Id.* at 50-51.

In *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), this Court reviewed a legislative change to the frequency with which the California Board of Prison Terms reconsidered inmates who had been initially denied parole, finding no ex post facto violation, but rather that the change created "only the most speculative and attenuated risk of increasing the measure of

punishment. . . . " *Id.* at 514. Furthermore, in *Morales*, this Court reaffirmed its support for the *Calder* and *Beazell* definitions commended in *Collins*, stating that "[a]fter *Collins*, the focus of an ex post facto inquiry is . . . on whether any [legislative] change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Morales*, 514 U.S. at 507, n. 3. This Court also removed from ex post facto consideration the question of whether retrospective laws merely "disadvantage" offenders, calling "that language . . . unnecessary to the results . . . and inconsistent with the framework developed in *Collins v. Youngblood*. [cit.]" *Id.*[1]

Thus, based upon this evolution of ex post facto jurisprudence, in order to prevail on a claim that a change in the law, as applied to an individual, is an ex post facto law, one must do more than to merely demonstrate "disadvantage." Indeed, there must be a showing that the "change alters the definition of criminal conduct or increases the penalty by which a crime is punished." *Morales*, 514 U.S. at 507, n. 3. Such showing cannot be "speculative or attenuated [*Morales*, 514 U.S. at 508-9]," but it must instead be demonstrated "with . . . certainty that the amended statutory scheme was more onerous than at the time of the crime." *Lynce*, 519 U.S. at 446, n. 16.

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[1] Although this Court again used the term "disadvantage" in *Lynce v. Mathis*, 519 U.S. 433, 441 (1997), the Court was careful to remain true to the earlier definitions by cautioning, as it had in *Morales*, that the "relevant inquiry is whether the change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Lynce*, 519 U.S. at 443. Thus, it appears that the "disadvantage" standard is truly disfavored.

A. GEORGIA'S PAROLE BOARD IS INVESTED WITH BROAD AUTONOMY AND DISCRETION.

Unlike the California Board of Prisons Terms described by this Court in *Morales*, Georgia's Board of Pardons and Paroles is the sole seat of all executive clemency powers. Ga. Const., Art. IV, § 2, ¶ 2. Any attempt by the General Assembly to limit the discretion of the Board to parole inmates within its jurisdiction would violate the separation of powers provision of Georgia's Constitution. *Id. See also*, Ga. Code Ann. § 42-9-1.

The Eleventh Circuit has previously had occasion to review the constitutionality of Georgia's parole system. In *Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir.), *cert. denied*, 513 U.S. 1191 (1995), the Eleventh Circuit, addressing whether the parole "grid system" used for non-life sentence cases created a "liberty interest," found that the Board, because of its constitutional and statutory autonomy under Georgia law, exercised "substantial discretion . . . [which] belies any claim to a reasonable expectation of parole." *Id.* at 1502.

Similarly, in *Jones v. Georgia State Board of Pardons and Paroles*, 59 F.3d 1145 (11th Cir. 1995), the Eleventh Circuit found no ex post facto violation in the retrospective application of a change in the method of calculating a non-life sentence inmate's tentative parole month pursuant to the "grid system" because the Board exercised "virtually unfettered discretion" to deviate from those guidelines which *it* had established. *Id.* at 1150.

Georgia's General Assembly vested in the Board the authority to "promulgate rules and regulations, not

inconsistent with" Georgia law. Ga. Code Ann. § 42-9-45(a). Pursuant to that authority, the Board adopted, and later amended, the regulation in question, Ga. Comp. R. & Regs. r. 475-3-.05(2), providing for the frequency of parole reconsiderations in life sentence cases after an inmate is initially denied parole. (J.A. 86, 88).

The Board further described its intentions regarding parole reconsideration schedules, after having amended its policy to allow a "set-off" of reconsideration for up to eight years, through its written policies and procedures. Those policies clearly indicate how the Board intends to exercise its "virtually unfettered discretion" by stating that "[a]t the time the members vote to deny parole in a life sentence case, the members will indicate the number of years the inmate must serve prior to being next considered." (J.A. 56).

The Georgia Board of Pardons and Paroles has exercised its considerable discretion to free itself from focusing upon those inmates, like Jones, whose heinous crimes and multiple-offender status gives them, in the Board's opinion, virtually no near-term likelihood for parole, and instead focus its limited resources and time upon those cases which do. The propriety of this change is borne out by the fact that, unquestionably, it is the Board which has, and will continue to have, the only authority to decide whether Jones is ever released from prison.

Thus, the Board, empowered as it is with the ultimate decision-making power as to Jones' parole, should not be prohibited from determining how to best utilize its resources by deferring parole reconsideration of this inmate whom it has clearly indicated has little or no

likelihood of parole within the next eight years barring a significant change in circumstances. That, however, is exactly the effect of the Circuit Court's decision below.

Embodied in the state constitutional provisions, statutes, regulations and policies outlined above is the decision by the State of Georgia that its Pardons and Paroles Board should be the body which has the ultimate authority over the exercise of executive clemency. The regulation challenged in the trial court by Respondent Jones is, quite simply, the extension of that very decision.

The Board has, by and through that regulation and the accompanying policies and procedures, expressed its desire to bring its discretion to bear in a manner which is cost-effective and efficient, while still being fair and equitable to those inmates within its jurisdiction. Thus, inmates with no realistic near-term likelihood of parole (as determined by the ultimate decision-makers) are not caused to suffer the likely emotional stresses of being frequently considered, only to be frequently denied. Rather, those inmates are told, honestly and directly, that they cannot anticipate parole within the period of their "set-off," save for a "change in their circumstances or where the Board receives new information that would warrant a sooner review."

Apart from the above, this process has the additional salutary effect of encouraging inmates whose heinous crimes, lengthy criminal histories, or poor institutional records are tempered by no (or inadequate) attempts at rehabilitation to undertake such measures in hopes that those efforts will be viewed favorably by the Board at the inmate's next reconsideration. The ability of the Board to

set off reconsideration on an individual basis also provides that inmate with an indication of how extensive those efforts must be.

Additionally, the ability of the Board to effectively direct the expenditure of its resources allows it to focus those limited resources upon the inmates within its jurisdiction who do, in fact, have a realistic near-term likelihood for parole. Thus, the Board, faced as it and all other corrections-related entities are nationwide with burgeoning prison populations, is able to focus those resources where they can be most effective.

B. A CORRECT APPLICATION OF THIS COURT'S PRECEDENTS DEMONSTRATES THAT GEORGIA'S PAROLE RECONSIDERATION SCHEME DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

What Petitioner seeks is an application by this Court of the ex post facto analysis which is set out above. By analyzing the effect of applying this change in the Regulation to Jones, this Court should conclude that no effect, aside perhaps from the salutary ones set out above, can ever be conclusively demonstrated. Such analysis, free from the speculation urged by Jones and engaged in by the Court below, leads inexorably to the conclusion that Jones' two life sentences, coupled with the heinous crimes for which he received them and the multiple parole denials by the Board, has no basis to *ever* expect to

be paroled. Thus, he can show nothing more than mere speculation in support of his claim.[2]

In *Morales*, this Court noted that the Ex Post Facto "Clause is aimed at the laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts'," 514 U.S. at 504, and found the relevant inquiry to be "whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Id.* at 506, n. 3. Moreover, this Court warned the judiciary against "the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures. . . . " *Id.* at 508.

Such an approach, guided by the admonition of this Court to "[focus] on the effect of the [change in the] law on the inmate's sentence," *Lynce*, 519 U.S. at 444, yields a review based upon the regulation in question, not a comparison between two systems, as was engaged in by the Eleventh Circuit.[3] An appropriate application of those

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[2] The same is, of course, true of any inmate serving a life sentence in Georgia, although the Board is only applying this policy to a limited class of inmates. (J.A. 49-50).

[3] Such was the case in numerous other circuits and states that have applied those notions to parole system changes within their own jurisdictions and have found no violation of the Ex Post Facto Clause. *See, e.g., Hill v. Jackson*, 64 F.3d 163 (4th Cir. 1995); *Roller v. Gunn*, 107 F.3d 227 (4th Cir.), *cert. denied*, 522 U.S. 874 (1997); *Shabazz v. Gabry*, 123 F.3d 909 (6th Cir.), *cert. denied*, 522 U.S. 1019 (1997); *Furnari v. Savaras*, 914 P.2d 508 (Colo. 1996); *Tuff v. State*, 732 So. 2d 461 (Fla. 1990); *Fletcher v. Williams*, 179 Ill. 2d 225 (1997); *Jordan v. Tennessee Board of Paroles*, 1997 Tenn. App. LEXIS 27.

factors to the change in the frequency of parole reconsideration in Georgia, free from the speculation engaged in by the Circuit Court, can only yield the result that there is no ex post facto violation in the application of this rule change.

Respondent Jones complains that the change by the Board to its rule extending the maximum "set-off" period for parole reconsideration to eight years is an ex post facto law. Neither the Circuit Court below nor Jones has ever pointed to any fact, statute, regulation, or policy that supports this claim. Instead, they rely upon the ***assumption*** that more frequent *mandatory parole reconsideration* leads to an earlier release date, and thus Jones' sentence is extended by the amended regulation; or, as stated by the Circuit Court, there is a "sufficient risk" that the amendment would "increase the measure of punishment attached to the crimes." *Jones v. Garner*, 164 F.3d at 595. (cits. omitted).

The cornerstone of Jones' argument, this alleged nexus between reconsideration frequency and the length of incarceration, ***cannot be proven***. The Board has discretion over the ultimate question of whether Jones will ever within his life span be released from confinement, and the Board has clearly indicated in denying him parole in 1995 (as it had done twice previously) that "the main reasons for this decision cited by the Board . . . are [the] circumstances and nature of offenses, and multiple offenses." *Jones v. Garner*, 164 F.3d at 594, n. 7. Jones' assertion, and the Eleventh Circuit's decision, that the application to him of a change in parole reconsideration requirements is an ex post facto law is thus based solely upon "the most speculative and attenuated possibility of

producing the prohibited effect of increasing the measure of punishment." *Morales*, 514 U.S. at 509.[4]

Should this Court decide contrary to Petitioners in this cause, the effect will be to plunge the judiciary into the "micromanagement of an endless array of legislative adjustments to parole and sentencing procedures" warned of by this Court in *Morales*. 514 U.S. 508-9. Such predicted consequences are no mere hyperbole, as any observer of prisoner litigation is all too well aware.

The Board's policies and procedures clearly allow inmates to bring matters before the Board *at any time* when the inmate believes those matters warrant parole reconsideration. Likewise, the Board, pursuant to public information or its own investigation, might well *sua sponte* decide it necessary to reconsider inmates prior to their set-off reconsideration date. Thus, concerns regarding extended periods of "parole ineligibility" and "chances" for parole missed because of reconsideration set-offs are the true hyperbole in this case.

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[4] Given the Circuit Court's previous holdings that Georgia's Parole Board is empowered with such broad discretion, and the Constitutional and statutory provisions which undergird that conclusion, one is forced to speculate that the Court below has concluded that, although it cannot compel the Board to exercise its discretion to release any inmate, it can, and will, force the Board to consider inmates for parole on a schedule which it deems appropriate. This premise rests upon the fallacious nexus between frequent reconsideration and earlier parole.

C. THE ELEVENTH CIRCUIT'S ANALYSIS OF GEORGIA'S PAROLE RECONSIDERATION SCHEME WAS ERRONEOUS AND MISAPPLIED THIS COURT'S CLEAR PRECEDENTS.

The Eleventh Circuit erred in reversing the District Court's grant of summary judgment in favor of the Board, and further erred in concluding that this Court's decision in *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), did not overrule the Circuit Court's previous decision in *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991), but instead reaffirmed "the correctness of our holding in that case." *Jones v. Garner*, 164 F.3d at 596. A review of the Circuit Court's decisions in both the present case and in *Akins* reveals that the principal basis for the Court's erroneous rulings in these cases is its fundamental misunderstanding of the operation of Georgia's parole system.

The Eleventh Circuit's assumption in *Akins*, and later in its decision in the present case, that there is an inherent relationship between the frequency of mandatory parole reconsideration and how soon an inmate is released from confinement most clearly demonstrates its misunderstanding.[5] *See, e.g., Jones v. Garner*, 164 F.3d at 591, n. 4;

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[5] This notion has been *specifically rejected* by the Sixth Circuit Court of Appeals, which found that "there exists no legal nexus between the decrease of regularly scheduled parole hearings and eligibility for parole," based upon *Morales*. *Shabazz v. Gabry*, 123 F.3d 909, 914 (6th Cir), *cert. denied* 522 U.S. 1019 (1997). The Court in *Shabazz* was openly critical of a lower court which "relied upon an assortment of anecdotal observations and speculation to conclude that the amendments may present sufficient risk of increased punishment. [The Sixth Circuit

Akins, 922 F.2d at 1562. The Court's misunderstanding of Georgia's parole system is further illustrated by its findings in *Akins*, which it later reaffirmed in *Jones v. Garner*, that "a parole reconsideration hearing is part of a prisoner's parole eligibility." *Jones v. Garner*, 164 F.3d at 591, n. 4 (quoting *Akins*, 922 F.2d at 1561-62).

Even assuming, *arguendo*, that parole eligibility is part of an inmate's sentence, that decision does not affect the inquiry here because Jones became eligible for parole after serving seven years of his second life sentence, at which time he was immediately reviewed for parole, and denied. The Board subsequently, based upon its clearly expressed policy, "set-off" its reconsideration of Jones for eight years.

The specific aspect of Georgia's parole system that the Court's premise fails to consider is that Jones became eligible for parole by operation of law after serving seven years of his 1982 life sentence, and he has remained eligible for parole since that date. The Court's conclusion that "eligibility in the abstract is useless," [*Akins*, 922 F.2d 1562; *Jones v. Garner*, 164 F.3d at 591, n. 4] fails to reckon with the reality that, in life, we may be eligible for many positions, honors, awards, or accolades, but it is the discretion of the decision-making body that may "keep" us from them, not "ineligibility." Under the Eleventh Circuit's definition of parole eligibility, the only time an

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found that such a] holding is erroneous in light of [this Court's] explicit rejection in *Morales* of the expansive view that 'the Ex Post Facto Clause forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment'." *Id.* at 914-15.

inmate would be eligible for parole is the precise moment when the inmate is actively being considered by the Board.

Here, it is the discretion of the Board, lawfully granted and lawfully exercised, that has kept Jones from parole, not the frequency or infrequency of his reconsideration. Any other conclusion strains credulity and is unsupported by the record. If the Court below had, as it claimed, focused upon "a prisoner's ultimate date of release . . . to determine whether the change constitutes a 'sufficient risk of increasing the measure of punishment attached to the covered crimes' [*Jones v. Garner*, 164 F.3d at 593]," it could not have reached its conclusion that the change in Georgia's parole reconsideration scheme was an ex post facto law.

Unfortunately, however, the Court engaged in precisely the type of "speculative and attenuated" reasoning which this Court has rejected. *Morales*, 514 U.S. at 509. As noted above, because the ultimate decision of whether Jones will ever, during the course of his natural life, be released from prison is now and will always be within the discretion of the Board, he *cannot* demonstrate beyond mere speculation that he will (or even may) remain in prison longer because the Board changed its reconsideration schedule to allow themselves to review Jones as infrequently as every eight years. This fact is underscored by the further reality that the Board's particularized decision to "set-off" Jones' parole reconsideration for eight years was due to *its determination*, pursuant to its own policy, that "it is not reasonable to expect that parole will be granted during the intervening years." (J.A. 56).

The Eleventh Circuit's fundamental misunderstanding of Georgia's parole system, as discussed above and made evident in its decision below and in *Akins*, has manifested itself in the Circuit Court misapplying this Court's decision in *Morales* to the facts of the instant case.

Even a cursory review of the Eleventh Circuit's decision below reveals that its analysis of this Court's rulings in *Morales* is limited to a perfunctory application of the factors deemed appropriate by this Court *in that particular case*. The court below engaged in that perfunctory review process when it "examine[d] the [Georgia] regulation in light of the factors discussed in *Morales* and [found] it to be wholly distinguishable from the statute at issue in that case." *Id.* at 553.

In reviewing the instant regulation, the Eleventh Circuit found that the "set of inmates whose parole consideration will be affected by [the Georgia regulation] is thus *bound* to be far more sizeable than" the set in *Morales*. (Emphasis supplied). *Id.* at 594. The Circuit Court then went on to say that "[t]his set must . . . be comprised of many inmates who can *expect* at some point to be paroled [emphasis supplied]." *Id.*[6]

The fact that the Georgia regulation applies to all life-sentenced inmates is without significance. First, such criticism smacks of the "micromanagement" warned against by this Court in *Morales*, 514 U.S. at 508. Next, the Court

[6] As noted above, the Circuit Court has previously held that the "substantial discretion reserved by the Board belies any claim to a reasonable expectation of parole." *Sultenfuss v. Snow*, 35 F.3d 1494, 1502 (11th Cir.), *cert. denied*, 513 U.S. 1191 (1995).

below wholly disregarded the evidence in the record, in the form of the affidavit of the Board's Director of Legal Services, who averred that the Board's set-off policy was applied to "life sentenced inmates who have committed capital offenses and inmates serving life sentences under Georgia's Serious Violent Felony Recidivists laws." Also, as noted above in Petitioner's factual statement, the crimes for which Jones is incarcerated are equally horrific to those committed by Morales. Lastly, the Board is under no obligation to *ever* parole *any* inmate serving a life sentence.

The Court below described Ga. Comp. R. & Regs. r. 475-3-.05(2) as not "carefully tailored" to further the legitimate end of saving time and money and not increasing punishment.[7] That criticism was comprised of several aspects, including the "lack" of a requirement to make any particularized findings in its decision to "set-off" an inmate for a period beyond the previous three year interval, the "lack" of "any sort of hearing on this question,"

[7] This inquiry seems to be in conflict with this Court's admonition in *Lynce* that "to the extent that any purpose might be relevant in this case, it would only be the purpose behind the" Board's 1995 amendments. *Lynce*, 519 U.S. at 433. An application of such mandate, mindful of the Board's broad discretion, leaves one to ask what possible purpose the Board could have had to promulgate such a regulation other than to relieve itself of the continual burden of reviewing inmates about whom it had determined "it is not reasonable to expect that parole would be granted during the intervening years," and focus upon the overwhelming remainder of those inmates under its jurisdiction.

and that the "default" frequency under the Georgia regulation is "at least every eight years." *Jones v. Garner*, 164 F.3d at 595.

The Circuit Court's criticism stems, again, from a lack of understanding about Georgia's parole scheme. To hold that a Board which is under no requirement, either constitutional or statutory, to *ever* hold parole consideration hearings or make particularized findings regarding the decision to deny parole to an inmate should nonetheless be required to hold such hearings or make such findings supporting a decision to delay *reconsideration* for parole simply does not follow.[8] As the Court cites nothing in support of its apparent belief in the constitutional significance of this factor, it amounts only to the type of "speculative and attenuated possibility of . . . increasing the measure of punishment" which this Court held in *Morales* was insufficient "under any threshold we might establish under the Ex Post Facto Clause." *Id.* at 509.[9]

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[8] Note, however, that among the reasons for denying parole to Jones and setting off his reconsideration are the reasons stated in the Board's 1995 letter to him: i.e., the "circumstances and nature of the offense, and multiple offenses." Given the Board's reliance on such factors (which had been static for 15 years) in denying parole and setting off reconsideration, one wonders how Jones' term of confinement is actually increased by setting off his reconsideration for an additional five years, given his ability to bring important changes to the Board's attention in the interim and request expedited review.

[9] *See also, Shabazz v. Gabry*, 123 F.3d 909, 915 (6th Cir.), *cert. denied*, 522 U.S. 1019 (1997) ("anecdotal observations and personal speculation" provide no basis for finding ex post facto violation).

Also, the Court below characterized the Board's "default" reconsideration schedule as "at least every eight years." This conclusion is belied by Board procedure 4.110, which indicates that "[a]t the time the members vote to deny parole in a life sentence case, the members will indicate the number of years the inmate must serve prior to being next considered." (J.A. 55-7). Thus, there is no "default" set-off period, rather there is only the individualized determination by the Board as to how long that inmate's next parole consideration should be deferred. The Circuit Court's formulaic approach to this scheme is best summarized by its statement that "eight years is a long time." *Jones v. Garner*, 164 F.3d at 595. Given such an incredible conclusion, the Eleventh Circuit found the Board's specific policy, described above, to be inadequate.[10]

Although the Circuit Court below tacitly acknowledges this Court's later clarifications of *Morales* made in

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[10] Moreover, the Board's policies and procedures in this regard are essentially its own interpretation of the requirements upon it, which the Court below has previously held to be "entitled to great deference, unless clearly erroneous." *Sultenfuss v. Snow*, 35 F.3d 1494, 1503 (11th Cir.), *cert. denied*, 513 U.S. 1191 (1995). The Circuit Court's conclusion that the Board's Policy Statement is inadequate because it is "unenforceable and easily changed" clashes with the presumption in Georgia law, first stated by Justice Lumpkin of the Georgia Supreme Court in 1846 that "must not this Court, in favor of Public Officers, presume that they discharged their duty, in compliance with the law, in absence of all proof to the contrary?" *Doe, ex dem. Truluck, et al. v. Peeples*, 1 Ga. 1 (1846). *See also, Brantley v. Thompson*, 216 Ga. 164 (1960); *Jarrett v. City of Boston*, 209 Ga. 530 (1953); *Kirk v. State*, 73 Ga. 620 (1884).

Lynce, the Eleventh Circuit fails to properly focus, as this Court directed, on the effect of the law on the inmate's sentence. *Lynce*, 519 U.S. at 444. Had the Circuit Court held true to that directive, it perhaps would have avoided the perfunctory application of the factors of California's law to that in Georgia's parole scheme. Instead, the Eleventh Circuit, bound as it was to the erroneous notion of a nexus between the frequency of parole reconsideration and the date of release, effectively limited this Court's decision in *Morales* to its facts. Such cannot be what this Court intended.[11]

The fact-bound interpretation of this Court's decision in *Morales* which was rendered by the Circuit Court below is inconsistent with a system of federalism which allows states the freedom to approach a problem from a variety of perspectives. The Circuit Court's interpretation further fails to recognize the organic nature of state law in a system of federalism. How can Georgia be expected, based upon its vastly different historical and constitutional underpinnings, to produce a parole system identical to California's? And, more importantly, why should it, in a system of federalism, be expected to do so?[12]

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[11] Other jurisdictions have applied the holding in *Morales* to parole scheme changes more broad than those in that case, and have found those changes not to be ex post facto laws. Thus, those decisions reject the limited application given *Morales* by the Court below. Indeed, the Fourth Circuit Court of Appeals has explicitly rejected such a limited interpretation of *Morales*. *Roller v. Gunn*, 107 F.3d 227, 237 (4th Cir.), *cert. denied*, 522 U.S. 874 (1997); *Hill v. Jackson*, 64 F.3d 163 (4th Cir. 1995).

[12] This is not to say that the Circuit Court below erred in undertaking to review the present matter to determine whether the rule in question is an ex post facto law. Rather, the Circuit Court's error was in drawing from this Court's decision in *Morales* a command to conduct such an analysis in a perfunctory and fact-specific manner. To draw so little from this Court's opinion in *Morales* ignores the fact that, given the paucity of cases which this Court can consider each year, its decisions *must* be something more than mere fact-specific rulings from which no guidance can be drawn for other circumstances faced by inferior Courts in the future.

In comparing, by rote, the characteristics of the California statute in *Morales* to the Georgia parole scheme, the Circuit Court has espoused a view that any system not exactly like that reviewed in *Morales* is likely to be constitutionally infirm if it is forced by burgeoning prison populations, limited resources and limited time to change the frequency with which it reviews inmates for parole. Such a conclusion fundamentally misapplies this Court's decision in *Morales*.

II. THE ELEVENTH CIRCUIT ERRONEOUSLY PLACED THE BURDEN OF PROOF UPON PETITIONERS, CONTRARY TO THIS COURT'S CLEAR DIRECTIVE IN *MORALES*.

The Eleventh Circuit reviewed the instant grant of summary judgment by the District Court *de novo*.[13] In so doing, however, the Court below erroneously placed the burden of proof upon the Board. See, *e.g.*, *Jones v. Garner*, 164 F.3d at 595-96.

At its essence, the opinion of the Circuit Court below finds that the Board has not carried its burden of proving that, in light of the Eleventh Circuit's previous opinion in

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[13] *Tackitt v. Prudential Ins. Co.*, 758 F.2d 1572 (11th Cir. 1985).

Akins, the amended regulation in question does not violate the Ex Post Facto Clause. Thus, the Court below has apparently substituted its holding in *Akins* for the requirement that Jones bear the burden of proof, and has cast that burden, instead, upon the Board to "prove the negative" that there is no ex post facto violation in the application of that amended regulation to Jones.

As this Court stated in *Morales*, "we have never suggested that the challenging party may escape the ultimate burden of establishing that the measure of punishment itself has changed. Indeed, elimination of that burden would eviscerate the view of the Ex Post Facto Clause that [was] reaffirmed in [*Collins v. Youngblood*, 497 U.S. 37 (1990)]." 514 U.S. at 510, n. 6. Indeed, it is the presumption of the Circuit Court below (born, as set forth above, from its misunderstanding of Georgia's parole scheme) that there is a nexus between the frequency of mandated parole reconsideration and the date of release from confinement which has been substituted herein below for the burden of proving "that the measure of punishment has changed." *Id.*

The evidence *produced by the Board* demonstrated that Jones had been considered for and denied parole in 1989, 1992, and 1995. *Jones v. Garner*, 164 F.3d at 590. Jones has never demonstrated that his confinement has been lengthened by the instant regulatory change. Indeed, as shown herein above, Jones cannot demonstrate beyond mere supposition that his confinement *could be lengthened*. Instead, in the proceedings below, it was the Circuit

Court's assumption that was substituted for that proof, thereby shifting the burden to the Board. This was error.[14]

The only claim posited by Jones (or, on his behalf by the Circuit Court below) is the assumption, without proof, that the increased interval between parole reconsideration reviews lengthened his sentence.[15] Thus, the burden of proof has been erroneously shifted to the Board.

Had the Eleventh Circuit correctly followed the mandate of this Court in *Morales*, Jones would have been required to provide proof to support his claims. Instead, the Eleventh Circuit improperly shifted the burden of proof to the Board. Had this Court's mandate been followed, the Circuit Court would have reached the inevitable conclusion that Jones' ex post facto violation claim

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[14] In *Johnson v. Gomez*, 92 F.3d 964 (9th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997), the Ninth Circuit, applying this Court's reasoning in *Morales*, found that "[i]n this case, [the inmate] is similarly unable to demonstrate that an increase in his punishment actually occurred, because, like Morales, he had not actually been paroled under the old law." *Johnson*, 92 F.3d at 967.

[15] In *Roller v. Gunn*, 107 F.3d 227 (4th Cir.), *cert. denied*, 522 U.S. 874 (1997), the Fourth Circuit Court of Appeals rejected as "conjecture" an inmate's unsubstantiated claims that a decrease in the required frequency of parole reconsideration increased his punishment. *Id.* at 236. Such an approach is consistent with this Court's "sufficient risk of increasing the measure of punishment" analysis in *Morales*, 514 U.S. at 509, because the Fourth Circuit recognized that mere "conjecture" can never form the basis of a "sufficient risk."

was *necessarily* premised upon supposition and assumption. The Eleventh Circuit's failure to properly place the burden of proof is error requiring reversal.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Petitioner prays that this Honorable Court reverse the judgment of the Eleventh Circuit Court of Appeals, and direct that judgment be entered in favor of Petitioners.

Respectfully submitted,

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No. 99-137

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IN THE
Supreme Court of the United States

J. WAYNE GARNER, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, JAMES T. MORRIS, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, GARFIELD HAMMONDS, JR., former Chairman of the State Board of Pardons and Paroles of the State of Georgia, BOBBY K. WHITWORTH, Member of the State Board of Pardons and Paroles of the State of Georgia, and TIMOTHY E. JONES, former Member of the State Board of Pardons and Paroles of the State of Georgia,

Petitioners,

v.

ROBERT L. JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether the Ex Post Facto Clause of the United States Constitution bars the State of Georgia from applying its amended parole regulations to inmates whose crimes predated the amendment, where the amendment increases the maximum time between life-sentenced inmates' parole reconsideration from three to eight years without procedural safeguards.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Introduction	1
B. Georgia's Parole System and the Eight-Year Rule	1
C. The Facts Regarding Retroactive Application of the Eight-Year Rule	4
D. Proceedings Below	5
SUMMARY OF THE ARGUMENT	6
ARGUMENT	9
I. RETROACTIVE APPLICATION OF GEORGIA'S EIGHT-YEAR RULE OFFENDS THE EX POST FACTO CLAUSE BY CREATING A "SUFFICIENT RISK" OF INCREASED PUNISHMENT FOR PAROLE ELIGIBLE LIFE-TERM PRISONERS	9
II. THIS COURT'S DECISION IN *MORALES* CONFIRMS THAT GEORGIA'S RETROACTIVE APPLICATION OF THE EIGHT-YEAR RULE VIOLATES THE EX POST FACTO CLAUSE	20
III. CONSTITUTIONAL POLICY CONFIRMS THE INVALIDITY OF GEORGIA'S RETROACTIVE IMPOSITION OF ITS EIGHT-YEAR RULE	30
CONCLUSION	37

TABLE OF AUTHORITIES

CASES

	Page
Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991), *cert. denied*, 501 U.S. 1260 (1991)	1, 4, 5, 7, 13
Beazell v. Ohio, 269 U.S. 167 (1925)	7, 13, 20, 21, 35
Beebe v. Phelps, 650 F.2d 774 (5th Cir. Unit A 1981)	12
Board of Pardons v. Allen, 482 U.S. 369 (1987)	16, 18
Calder v. Bull, 3 U.S. (Dall.) 386 (1798)	10
California Dep't of Corrections v. Morales, 514 U.S. 499 (1995)	*passim*
Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1980)	11
Craig v. Boren, 429 U.S. 190 (1976)	37
Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867)	20
Devine v. New Mexico Dept. of Corrections, 866 F.2d 339 (10th Cir. 1989)	12
Dobbert v. Florida, 432 U.S. 282 (1977)	9, 12, 14, 20, 35
Eastern Enterprises v. Apfel, 524 U.S. 498 (1998)	9, 32, 33
Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989)	12
Geraghty v. United States Parole Comm., 579 F.2d 238 (3rd Cir. 1978), *vacated on other grounds*, 445 U.S. 388 (1980)	12
Greenfield v. Scafati, 277 F. Supp. 644 (Mass. 1967), *aff'd*, 390 U.S. 713 (1968)	12, 13, 17
Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979)	12, 18, 33
In re Jackson, 703 P.2d 100 (Cal. 1985)	25
James v. United States, 366 U.S. 213 (1961)	36
Jones v. Garner, 164 F.3d 589 (11th Cir. 1999)	2, 22, 23, 27
Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454 (1989)	16
Landgraf v. United States, 511 U.S. 244 (1994)	32, 33
Lindsey v. Washington, 301 U.S. 397 (1937)	14, 15, 36
Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972), *vacated on other grounds*, 409 U.S. 1100 (1973)	12
Lynce v. Mathis, 519 U.S. 433 (1997)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
Miller v. Florida, 482 U.S. 423 (1987)	*passim*
Morrissey v. Brewer, 408 U.S. 471 (1972)	10, 11
New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)	35
Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998)	23
Reeves v. State, 447 U.S. 429 (1980)	35
Rodriguez v. United States Parole Comm., 594 F.2d 170 (7th Cir. 1979)	12
Rooney v. State of North Dakota, 196 U.S. 319 (1905)	14
Rummel v. Estelle, 445 U.S. 263 (1980)	17
Shepard v. Taylor, 556 F.2d 648 (2nd Cir. 1977)	12
Solem v. Helm, 463 U.S. 277 (1983)	*passim*
State v. Niska, 514 N.W.2d 260 (1994)	28
Sultenfuss v. Snow, 35 F.3d 1494 (11th Cir. 1994), *cert. denied*, 513 U.S. 1191 (1995)	9, 15, 16
Warden v. Marrero, 417 U.S. 653 (1974)	10, 11, 20
Weaver v. Graham, 450 U.S. 24 (1981)	*passim*
Wolff v. McDonnell, 418 U.S. 539 (1974)	10
Yamamoto v. United States, 794 F.2d 1295 (8th Cir. 1986)	12
UNITED STATES CONSTITUTIONAL PROVISIONS	
U.S. Const. Art. I, § 9	5
U.S. Const. Article I, § 10	5, 9, 10
GEORGIA CONSTITUTIONAL PROVISIONS	
Ga. Const. Art. IV, § II, ¶ 1	3, 18
STATUTES	
42 U.S.C. § 1983	5
Cal. Penal Code § 3041.5	24
O.C.G.A. § 16-13-30	3
O.C.G.A. § 42-9-53	2
OTHER AUTHORITIES	
William Crosskey, The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws, 14 U. Chi. L. Rev. 539, 540 (1947)	30, 31

TABLE OF AUTHORITIES—Continued

	Page
Hearings on H.R. 1598 and Identical Bills before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 93d Cong., 1st Sess., 163-164, 193 (1973)	11
Max Farrand, *The Records of the Federal Convention* 376 (Yale 1966)	31
Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1275 (1998)	30
Savannah Morning News, July 25, 1993, p. 8A	26
Joanne D. Spotts, *Sentence and Punishment: Provide for the Imposition of Life Sentence Without Parole*, 10 Ga. St. U. L. Rev. 183 (1993)	3, 4, 11
State of Georgia Board of Pardons and Paroles, *News Releases*, (visited December 5, 1999) <http://www.pap.state.ga.us/NRFrames.htm>	27
State of Georgia Board of Pardons and Paroles, *Parole Decisions* (visited December 5, 1999) <http://www.pap.state.ga.us/PFRames.htm>	2, 3
T. Cooley, Constitutional Limitations 272 (1868)	35
The Federalist No. 44, at 282 (James Madison) (Clinton Rossiter ed. 1961)	31
The Federalist No. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed. 1961)	31

STATEMENT OF THE CASE

A. Introduction

Respondent, Robert L. Jones, is one of many life-sentenced inmates in the Georgia prison system. Like other life-sentenced inmates whose crimes were committed between 1979 and 1985, Mr. Jones was entitled upon conviction to an initial parole consideration after seven years, and reconsideration "at least every three years" thereafter. (J.A. 86) (hereinafter the "three-year rule"). In 1985, the State of Georgia Board of Pardons and Paroles (hereinafter "Parole Board" or "the Board") changed its rules for reconsideration of life-sentenced inmates. Rather than providing for parole reconsideration on a three-year basis, the new rules provided for reconsideration "at least every eight years." (J.A. 88) (hereinafter the "eight-year rule").[1]

B. Georgia's Parole System and the Eight-Year Rule

As explained by the Court of Appeals in *Akins v. Snow*, 992 F.2d 1558, 1561-62 (11th Cir. 1991), *cert. denied*, 501 U.S. 1260 (1991), an inmate's parole reconsideration right in Georgia is considered to be "an essential part of parole eligibility." This is the case because, if a prisoner is denied for parole on his initial consideration, a reconsideration must take place before parole is granted. *Id.* Therefore, an inmate is effectively ineligible for parole throughout the period that runs between two parole reviews. *Id.*

In the Georgia prison system, an inmate who comes up for parole consideration does not have the opportunity for

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[1] Inmates whose crimes were committed prior to 1979 were entitled to reconsideration on *an annual basis*. However, if the Parole Board's retroactive application of the eight-year rule is upheld, they face a possible delay of *seven years* over the annual consideration they were guaranteed prior to the Board's 1995 amendment. *See Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991).

an in-person hearing before the Board of Pardons and Paroles. *See Jones v. Garner*, 164 F.3d 589, 594 (11th Cir. 1999). *See also* State of Georgia Board of Pardons and Paroles, *Parole Decisions* (visited December 5, 1999) <http://www.pap.state.ga.us/PRFrames.htm>. Instead, inmates are offered only an interview with a parole officer (not a Parole Board member), who completes a form that sets forth information such as "where [the inmate] has resided and worked; who his family members are and where they live; where he plans to live and work; and what his own account is of the crime." *Id.* In the event the inmate's request for parole is denied, the inmate is not allowed to review his file to determine the reasons for denial or what he can do to improve his chances of obtaining parole in the future; the contents of parole files are designated by statute as "confidential state secrets." O.C.G.A. § 42-9-53.

Georgia's eight-year rule does not require the Board to make any particularized inquiries in order to postpone the time of the inmate's parole reconsideration beyond the three-year period that the 1979 version of the regulations had required. (J.A. 88). The revised regulation also does not contain any guidance as to any particular facts or circumstances that should exist for the Board to delay reconsideration.

Instead, the Board issued a general directive, through a Policy Statement adopted in 1996, that the Board should set reconsideration dates for a maximum of eight years from the date of the last denial when "in the Board's determination, it is not reasonable to expect that parole would be granted during the intervening years." (J.A. 55-57). This Policy Statement was not adopted until one year after the Parole Board began to apply the eight-year rule retroactively and until after the Board had deferred Mr.

Jones' next consideration for eight years, until 2003. (*Compare* J.A. 55-57 *with* J.A. 54).

Like the regulation, the Policy Statement does not require any inquiry beyond a cold-record review of the contents of an inmate's parole file before putting off reconsideration for eight years. *Id.* In making this decision, Board members, whose terms of service are limited to seven years by the State Constitution, Ga. Const. Art. IV, § II, ¶ 1, do not convene to discuss an inmate's file. Rather, Board members consider files independently. *See* State of Georgia Board of Pardons and Paroles, *Parole Decisions* (visited December 5, 1999) <http://www.pap.state.ga.us/PRFrames.htm>.

The application of the amended parole regulations to inmates whose crimes pre-date the amendment extends to all life-sentenced inmates, including Respondent Jones. This class is not limited, as Petitioners suggest, to persons "who ha[ve] committed heinous crimes that would have resulted in the imposition of the death penalty in the past." *See* Pet'r Br., p. 3. Rather, the Board's Policy Statement includes "*all* Life Sentence Cases eligible for parole consideration." (J.A. 56) (emphasis added). This includes, for example, persons convicted of repeat violations of the Controlled Substances Act. *See* O.C.G.A. § 16-13-30.

There also is no basis to conclude that Georgia's policy applies only to a class of inmates who have "virtually no near-term likelihood of parole." *See* Pet'r Br., p. 15. In fact, as of 1993 (shortly prior to the Board's decision to apply the eight-year rule retroactively after this Court's decision in *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995)), the average time that life sentenced inmates in Georgia served was twelve years. Joanne D. Spotts, *Sentence and Punishment: Provide for the Imposition of Life Sentence Without Parole*, 10 Ga. St. U. L.

Rev. 183 (1993) (quoting former State Representative and current Georgia Attorney General Thurbert E. Baker).

Due to the District Court's initial rulings, there has been no discovery in this case. Nonetheless, the Board's own Policy Statement acknowledges that the eight-year rule was made applicable retroactively "to establish the maximum possible interval, in a Life Sentence Case, between a decision to deny parole and the time at which reconsideration for parole will occur." (J.A. 56). This statement, and other public statements made by the Board, *see infra* n. 19, support the inference that the Board's rule change reflected part of a systematic effort to "crack down" on life-sentenced inmates by extending the length of their prison sentences. The Board takes issue with this inference, by asserting that the eight-year rule is justified as a cost-saving measure. In support of this assertion, however, Petitioners presented no evidence in the District Court. They offer only the unsupported allegations made in the papers filed in this Court.

C. The Facts Regarding Retroactive Application of the Eight-Year Rule

In 1986, the Board began to apply the eight-year rule not only to inmates who were sentenced to life imprisonment for crimes committed after the rule's effective date, but also to those inmates, including Mr. Jones, whose crimes pre-dated the rule's adoption. In *Akins*, the Eleventh Circuit Court of Appeals held that this retroactive application of the eight-year rule violated the Ex Post Facto Clause. After *Akins*, the Board discontinued its retroactive application of the eight-year rule and resumed its original practice of considering inmates under the rules in effect at the time their offenses were committed.

In 1995, this Court decided *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995). Even though

the Court in *Morales* was careful to limit its ruling to the particular factual circumstances persented in that case, *see* 514 U.S. at 510 n.6, the Georgia Parole Board nevertheless interpreted *Morales* as supporting retroactive application of the eight-year rule. As a result, notwithstanding *Akins'* admonitions to the contrary, the Board again chose to apply the eight year rule to all life-sentenced inmates, regardless of when their crimes were committed. The consequence for Respondent Jones was that, when he was reconsidered for parole in 1995, he was informed that "[t]he board has decided to consider you again for parole during August 2003." (J.A. 54).

D. Proceedings Below

Jones filed suit pursuant to 42 U.S.C. § 1983, claiming that the Board's action violated the Ex Post Facto Clause. (J.A. 16).[2] Although Jones requested leave to conduct discovery to support his claims, the District Court denied his Motion for Leave to File Discovery. (J.A. 6).

Shortly thereafter, Petitioners filed a Motion for Summary Judgment, asserting that there was no genuine issue of material fact requiring further proceedings. (J.A. 34). Jones opposed the Board's Motion, and also moved for Summary Judgment on the grounds that retroactive application of the eight-year rule constituted a violation of the Ex Post Facto Clause under controlling precedent. (J.A. 58).

The District Court granted Petitioners' Motion for Summary Judgment, finding that *Morales* permitted the Board

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[2] There are two Ex Post Facto Clauses contained in the United States Constitution. The clause in Article I, § 10 prohibits state governments from passing ex post facto laws; the Clause contained in Art. I, § 9 applies the same prohibition to the Federal government. Unless otherwise specified, further references to the "Ex Post Facto Clause" herein refer to the Article I, § 10 clause that applies to state governments.

to apply the eight-year rule retroactively. (Pet. App. B, 20a). Jones appealed, and the Eleventh Circuit reversed, finding that the eight-year rule differed materially from the rule considered in *Morales*. The court's detailed opinion, authored by Judge Barkett and joined by Judge Birch and Judge Hancock (sitting by designation from the Northern District of Alabama), reasoned that the length of the set-off, combined with a lack of procedural safeguards and application of the rule to a "far more sizeable" group than that involved in *Morales*, 164 F.3d at 594, "seemed certain to ensure that some number of inmates will find the length of their incarceration extended." *Id.* at 595. Petitioners moved for reconsideration *en banc*. (Pet. App. C, 30a). Their request was denied with no dissenting vote. Petitioners then filed a Petition for a Writ of Certiorari with this Court.

SUMMARY OF THE ARGUMENT

Georgia's retroactive application of its eight-year rule violates the Ex Post Facto Clause. For a prisoner, few, if any, matters are of greater moment than the possibility of early release. As a result, this Court's jurisprudence firmly recognizes that "retroactive alteration of parole or early release provisions . . . implicates the Ex Post Facto Clause." *Lynce v. Mathis*, 519 U.S. 433, 445 (1997).

Here, Georgia has fundamentally reordered its parole provisions on an ex post facto basis. It has done so by replacing—for the broad class of all life inmates—a fixed entitlement to consideration for parole at least every three years, with an entitlement to consideration no more frequently than every eight years based on a perfunctory decision. Because consideration for parole is a necessary prerequisite for parole, Georgia's eight-year rule offends the basic principle that "the right to qualify for, and hence

earn, parole" may not be retroactively diminished. *Weaver v. Graham*, 450 U.S. 24, 34 (1981).

It is well settled that a delay in the initial consideration of a prisoner's parole eligibility would violate the Ex Post Facto Clause. *See infra*, pp. 12-13. As a matter of both logic and fairness, however, "[t]here is no principled distinction between changing the date of the initial hearing and changing the period between parole reconsideration hearings. Both substantially disadvantage a prisoner's parole eligibility and therefore his opportunity for parole." *Akins*, 922 F.2d at 1564. Indeed, because initial parole considerations commonly result in parole denials, the timing of parole reconsiderations often is of greater practical consequence to the prisoner. It follows that a prisoner's reconsideration rights may well constitute "a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Weaver*, 450 U.S. at 32. Dramatically altering such reconsideration rights—from every three years to every eight years (or, under the Board's rationale, to every 20, 40, or 60 years)—thus involves the sort of "harsh and oppressive" retroactive treatment the Ex Post Facto Clause prohibits. *Beazell v. Ohio*, 269 U.S. 167, 169 (1925).

This Court's decision in *Morales* confirms this conclusion. In that case, this Court focused meticulously on the distinctive features of the California system in holding that the state's carefully circumscribed adjustment of its earlier provision of annual parole hearings did not violate the Ex Post Facto Clause. This Court so concluded because the new rule: (1) postponed parole suitability hearings for a short period of time, (2) applied to only a narrow class of prisoners, (3) required specific findings to be made after a full hearing, and (4) operated within

a system that would allow the Board to correct any errors it might have made in ordering postponement. Thus, the risk of harm to prisoners was so "speculative and attenuated" that this change was of no constitutional significance. *Morales,* 514 U.S. at 509.

None of these circumstances applies to Georgia's eight-year rule. Unlike the California rule, Georgia's rule: (1) extends reconsideration intervals by five years, (2) covers all life prisoners, (3) affords no meaningful procedural safeguards, and (4) wholly lacks the no-harm-no-foul safeguard present in California. Georgia's rule thus offends *Morales'* governing standard by producing a "sufficient risk of increasing the measure of punishment." *Lynce,* 519 U.S. at 444 n.14. If this "sufficient risk" test is ever to be met, it must be where, as here, a state goes so far as to extend the time for parole reconsideration for a broad class of prisoners for five full years by way of a summary process.

Faced with these facts, Petitioners have no choice but to ask this Court to invent a novel and unyieldingly overreaching principle of law. They argue that the Ex Post Facto Clause can never be offended by a post-conviction adjustment of parole reconsideration rights. This assertion flies in the face of the whole tenor and nature of this Court's fact-specific analysis in *Morales* and its explicit teaching that cases of this kind concern a "matter of 'degree.'" 514 U.S. at 509. Even more fundamentally, the state's wholesale-exemption approach to the Ex Post Facto Clause threatens core concerns about tyranny, liberty and fairness that led the Framers to embrace that clause at our nation's founding.

As this Court has recognized time and again: "Retroactivity is generally disfavored in the law . . . in accordance with 'fundamental notions of justice' that have been

recognized throughout history." *Eastern Enterprises v. Apfel,* 524 U.S. 498, ——, 118 S.Ct. 2131, 2151 (1998). There are special and powerful reasons why this principle should apply to this case. This case does not involve merely a monetary loss, *see Eastern Enterprises, id.,* but a threat to the most basic of all human freedoms: freedom from physical confinement. This case does not concern a mere modification of legal procedures, *see Dobbert v. Florida,* 432 U.S. 282, 293-94 (1977), but an after-the fact tampering with the actual temporal dimensions of an inmate's sentence. This case does not hinge on a claim of "reasonable expectations" for purposes of procedural due process, *see Sultenfuss v. Snow,* 35 F.3d 1494 (11th Cir. 1994), *cert. denied,* 513 U.S. 1191 (1995), but involves an ex post facto interference with rights concerning parole, which this Court has described as "a regular part of the rehabilitative process." *Solem v. Helm,* 463 U.S. 277, 300 (1983). And most important, this case—in pointed contrast to *Morales*—presents such a radical reformulation of parole reconsideration rights that it generates an obvious risk of lengthening actual periods of confinement for many prisoners in the real world. In sum, Georgia's eight-year rule offends the Ex Post Facto Clause because, in a practical way, it retroactively and profoundly diminishes "a prisoner's eligibility for reduced imprisonment." *Weaver,* 450 U.S. at 32.

ARGUMENT

I. RETROACTIVE APPLICATION OF GEORGIA'S EIGHT-YEAR RULE OFFENDS THE EX POST FACTO CLAUSE BY CREATING A "SUFFICIENT RISK" OF INCREASED PUNISHMENT FOR PAROLE ELIGIBLE LIFE-TERM PRISONERS.

Our Constitution provides that: "No State shall . . . pass any . . . ex post facto Law." U.S. Const. Art. I,

§ 10, cl. 1. From the earliest days of the Republic, this Court has insisted that the clause bars not only the post hoc creation of crimes, but also any law "that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798).[3] In its most recent treatment of the Ex Post Facto Clause protections, this Court reaffirmed that this prohibition on increased punishment extends to after-the-fact reformulations of parole eligibility rules. As stated in *Lynce*: "retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the ex post facto clause . . . ." 519 U.S. at 445 (*citing Weaver v. Graham*, 450 U.S. at 321).

This Court's vigilance in guarding against retroactive dismantling of parole rights stems from a recognition of the extraordinary importance of parole eligibility. The Court often has noted that parole, when granted, is of surpassing significance to the prisoner because it "is a long step toward regaining lost freedom." *Warden v. Marrero*, 417 U.S. 653, 663 (1974).[4] No less important,

[3] Time and again, the Court has embraced and applied this formulation from *Calder* in its modern Ex Post Facto Clause cases. *See, e.g., Lynce*, 519 U.S. at 440; *Morales*, 514 U.S. at 504; *Miller v. Florida*, 482 U.S. 423, 428 (1987); *Weaver*, 450 U.S. at 29.

[4] In *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972), the Court explained that: "The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. . . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison." *See also Wolff v. McDonnell*, 418 U.S. 539, 561 (1974) (noting that deprivation of good time—even when it "may be restored"—"is unquestionably a matter of considerable importance," in part because it "can postpone the date of eligibility for parole.").

this Court has emphasized that parole, when available, is so often "granted regularly," that "[a]ssuming good behavior, it is the normal expectation in the vast majority of cases." *Solem*, 463 U.S. at 300, 302.[5] Notably, the likelihood of parole holds true in Georgia, where the average actual prison term of "life" inmates was only 12 years during the period immediately preceding the state's post-*Morales* reinstitution of its eight-year rule. *Spotts, supra* at p. 3. These real-world conditions create powerful expectancy and reliance interests in parole consideration rights. In particular, as this Court reiterated in *Lynce*: "a 'prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.'" *Lynce*, 519 U.S. at 445-46 (*quoting Weaver*, 450 U.S. at 31).[6]

[5] *See id.* at 300 ("Parole is a regular part of the rehabilitative process"); *Morrissey*, 408 U.S. at 477 ("the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). This Court, moreover, has recognized that this "normal expectation" fully extends to life prisoners; indeed *Solem* itself involved a discussion by the Court concerning the likelihood of parole for life prisoners. *See also Solem*, 463 U.S. at 316-317 (Burger, C.J., dissenting) (noting that early release is not limited to parole-based systems; even where commutation system substitutes for parole, early release is "what so many 'lifers' experience"); *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 462 (1980) (accepting lower court's assertion of an "overwhelming likelihood that Connecticut life inmates will be pardoned and released before they complete their minimum terms").

[6] *See also Warden v. Marrero*, 417 U.S. at 658; *Hearings on H.R. 1598 and Identical Bills before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 93d Cong., 1st Sess., 163-164, 193 (1973) (testimony and statement of Antonin Scalia, Chairman of the Administrative Conference of the United States) (noting that courts set maximum sentences anticipating "that a prisoner who demonstrates his desire for rehabilitation will not serve the maximum

In light of these settled principles, Petitioners neither can nor do suggest that a state may wholly negate pre-existing parole eligibility by way of retrospective action. *See Weaver*, 450 U.S. at 32 (*citing without question, Rodriguez v. United States Parole Commn.*, 594 F.2d 170 (7th Cir. 1979) for proposition that "elimination of parole eligibility [has been] held an ex post facto violation"); *Greenfield v. Scafati*, 277 F. Supp. 644, 646 (Mass. 1967) (same), *aff'd*, 390 U.S. 713 (1968). Likewise, there is and can be no contention that the state could retroactively alter "the date of any prisoner's *initial* parole suitability hearing." *Morales*, 514 U.S. at 511 (emphasis added). *See, e.g., Dobbert*, 432 U.S. at 298 (noting, without question, Florida Supreme Court's holding to this effect.[7] In fact, this Court has repeatedly barred retroactive interference with parole-eligibility rights,[8] except where there is "no reason to conclude that

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term or anything approaching the maximum") (*cited in Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 31 (1979) (dissenting opinion)). The risk of unfair state repudiation of parole rights relied upon in plea bargains was clearly on the Court's mind in *Lynce*. *See* 519 U.S. at 440 (noting that the Ex Post Facto Clause "places limits on the sovereign's ability to use its law-making power to modify bargains it has made with its subjects," including with regard to "the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt").

[7] The federal circuit courts appear to agree on this point. *See Fender v. Thompson*, 883 F.2d 303, 307 (4th Cir. 1989); *Devine v. New Mexico Dept. of Corrections*, 866 F.2d 339, 343 (10th Cir. 1989); *Yamamoto v. United States*, 794 F.2d 1295, 1300 (8th Cir. 1986); *Beebe v. Phelps*, 650 F.2d 774, 777 (5th Cir. Unit A 1981); *Geraghty v. United States Parole Comm.*, 579 F.2d 238, 266 (3rd Cir. 1978), *vacated on other grounds*, 445 U.S. 388 (1980); *Shepard v. Taylor*, 556 F.2d 648, 654 (2nd Cir. 1977); *Love v. Fitzharris*, 460 F.2d 382, 383 (9th Cir. 1972), *vacated on other grounds*, 409 U.S. 1100 (1973).

[8] *See Lynce*, 519 U.S. at 449; *Weaver*, 450 U.S. 36; *Greenfield*, 390 U.S. at 713.

[the state's action] will have any effect on any prisoner's actual term of confinement." *Morales*, 514 U.S. at 512, *quoted in Lynce*, 519 U.S. at 444.

Petitioners, however, now argue for a much broader principle—a principle that, in effect, would permit the state retroactively to put off any parole reconsideration to whatever later date it wished to choose in the exercise of its "virtually unfettered discretion." Pet'r Br. at 15. Petitioners cannot succeed in this effort to hermetically seal off parole reconsideration rights from initial consideration rights for Ex Post Facto Clause purposes. Indeed, because parole is often denied at the initial consideration stage, the nature and timing of reconsiderations may well be of *even greater* importance to the prisoner behind bars or the defendant considering a plea. Dramatically postponing reconsideration rights—under the Board's rationale, to every 20, 40 or 60 years—thus involves exactly the sort of "harsh and oppressive" treatment that the Ex Post Facto Clause forecloses. *Beazell v. Ohio*, 269 U.S. 167, 170 (1925).

There is another powerful reason why there is "no principled distinction between changing the date of the initial hearing and changing the period between parole reconsideration hearings." *See Akins*, 922 F.2d at 1564. Once an initial denial occurs, parole eligibility exists for an inmate only to the extent that the inmate is entitled to reconsideration. While there is no guarantee that any particular prisoner will actually be released after any particular reconsideration, there is a guarantee that a prisoner *cannot* be released until a reconsideration occurs. *Akins*, 922 F.2d at 1562. Such a precious chance for freedom—indeed, the only chance for freedom—may not be retroactively impaired by the state through extended deferrals of parole reconsideration consistent with the

Ex Post Facto Clause. Otherwise, the Clause's protection of "the right to qualify for, and hence earn, parole," *Weaver* at 34, *quoting Greenfield*, 277 F.Supp. at 646, would become a hollow promise.[9]

Petitioners also seek to render this Court's rulings an empty letter by requiring Respondent to prove "with . . . certainty" that the eight-year rule has led in fact to lengthened prison terms. Pet'r Br. at 9. This is not the law.[10]

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9 This Court's precedents outside the parole context support the same conclusion. In *Lindsey v. Washington*, 301 U.S. 397 (1937), this Court found an *Ex Post Facto Clause* violation in a state's substitution of a mandatory 15-year sentence for a discretionary sentence range of up to 15 years. Likewise, in *Miller v. Florida*, 482 U.S. 423 (1987), this Court struck down the state's retroactive substitution of a presumptive sentencing range of 3½ to 4½ years for a presumptive range of 5½ to 7 years. In both cases, undermining the sentencing authority's preexisting "discretion" to impose "a much shorter sentence" was the downfall of the statutory revision. *Dobbert*, 432 U.S. at 300. This same principle controls this case because the discretionary power to reduce the length of a prisoner's sentence has likewise been taken away. That this discretionary choice has been removed on the back-end (*i.e.*, with respect to the later Parole Board decisions), rather than the front end (*i.e.*, with respect to the decisions of sentencing judges) makes no difference "in the light of reason and common sense." *Rooney v. State of North Dakota*, 196 U.S. 319, 325 (1905).

10 Petitioners' newly minted "with . . . certainty" proof standard is derived by quoting wholly out of context a tiny fragment of the following statement in *Lynce*: "[W]e rejected the inmate's claim in *Morales*, because it could not be said with any certainty that the amended statutory scheme was more 'onerous' than at the time of the crime." 519 U.S. at 447, n.19. Petitioner's attempt to characterize this statement as requiring prisoners to prove "with . . . certainty" that they would in fact receive an earlier release date under the old system than the new (by conveniently substituting an ellipsis for the word "any") is flatly inconsistent with the Court's "sufficient risk" standard. *Morales*, 514 U.S. at 509; *Lynce*, 519 U.S. at 444 n.14. See *also Miller*, 482 U.S. at 432 (rejecting state's argument that defendant must "show definitively that he would have gotten a lesser sentence" because this argument "is foreclosed by our decision in *Lindsey*"). In a similar vein, Petitioners misstep in claiming that the Court of Appeals somehow misallocated the burden of proof on the "sufficient risk" issue. Pet'r Br. at 29-32. Petitioners, however, can and do cite no language in the lower court's opinion—because there is none—that reveals any departure from the controlling burden of proof principles outlined in *Morales*. *See* 514 U.S. at 510 n.6.

As this Court made clear in both *Morales* and *Lynce*, Respondent need only show that the eight-year rule "produces a *sufficient risk* of increasing the measure of punishment attached to the covered crimes." *Morales*, 514 U.S. at 509 (emphasis added); *see also Lynce*, 514 U.S. at 444 n.14. If this "sufficient risk" test is ever to be met, it must be met here: where the state has extended reconsiderations for all life inmates, based on only the most perfunctory process, for five additional years.

Petitioners seek to skirt this result by advancing three novel contentions. First, they argue that Respondent Jones cannot challenge Georgia's retroactive alteration of parole reconsideration rights because he cannot prove that retention of the three-year rule would advantage him personally, given the particular features of his case. *See* Pet'r Br. 10, 17. The controlling answer to this contention is that it has been squarely rejected by this Court. For purposes of the Ex Post Facto Clause, "[t]he inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular [offender]." *Weaver*, 450 U.S. at 33.[11]

Second, relying on *Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir. 1994), *cert. denied*, 513 U.S. 1191 (1995),

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11 *Accord*, *Morales*, 514 U.S. at 510 ("a party asserting an *ex post facto* claim need not carry the burden of showing that he would have been sentenced to a lesser term under the measure or range of punishments in place under the previous statutory scheme"); *Miller*, 482 U.S. at 432; *Lindsey*, 301 U.S. at 401. *See also Lynce*, 519 U.S. at 446 n.16 (inquiring whether "the amended statutory scheme was more onerous").

Petitioners emphasize that inmates in Georgia have been held to lack a "reasonable expectation" of parole. Pet'r Br. at 17-18, 24 n.6. Petitioners' logic seems to be that removing reconsideration rights for Georgia prisoners, who have no "reasonable expectation" of parole to begin with, cannot possibly cause them harm. The flaw in this argument lies in Petitioners' mistaken attempt to transplant a Fourteenth Amendment procedural due process concept into the very different Ex Post Facto Clause setting. In ruling that Georgia inmates lack a "reasonable expectation," the Circuit Court was using a term of art that denoted only that it is not the law that "the Board *shall* release the inmate when findings prerequisite to release are made." *Board of Pardons v. Allen*, 482 U.S. 369, 381 (1987); *accord, id.* at 381 (O'Connor, J., dissenting) (inquiry whether respondents have a "legitimate expectation" of parole "sufficient to give rise to an interest protected by procedural due process" hinges on whether proof of "specific statutory predicates" mandates a parole grant). States create a protected liberty interest by placing substantive limitations on official discretion. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462 (1989). Such a ruling in no way suggests that parole is routinely unavailable in Georgia and says nothing about the actual prospects for release of individual inmates affected by the eight-year rule. Indeed, *Sultenfuss* is beside the point because—while the "Due Process Clauses . . . protect pre-existing entitlements"—"[t]he presence or absence of an affirmative enforceable right is not relevant . . . to the *ex post facto* prohibition." *Weaver*, 450 U.S. at 30.

Finally, the state argues that the Parole Board's radical remaking of parole-reconsideration rules is permissible because the Board has "virtually unfettered discretion" over all aspects of the parole process, including "the ultimate decision-making power as to Jones' parole." Pet'r Br. at 15. This argument proves too much. Its logical end-point is that the state can retroactively eliminate parole altogether—a result that (as we have seen) the Ex Post Facto Clause condemns. *See supra* pp. 12-13.[12]

The fact that the Board has substantial discretion whether or not to grant parole only makes the inmate's reconsideration rights that much more important. The key point is that present-day attempts to predict the highly discretionary actions of future parole boards—especially when those predictions reach eight years into

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[12] *See also Greenfield v. Scafati*, 277 F. Supp. at 646 (holding that while "a prisoner's entitlement to parole lies in the discretion of the parole board," it is nonethless "an unlawful ex post facto burden to deprive him altogether of the right to be found qualified"), *aff'd*, 390 U.S. 713 (1968).

The Petitioners' ardent reliance on the discretionary nature of parole rights also raises concerns about evenhandedness and doctrinal symmetry. This is so because, in upholding long prison terms against attack under the Cruel and Unusual Punishment Clause, this Court has "relied heavily" on state entreaties that the prisoner who was given the long term was at the same time also made "eligible for parole." *Solem*, 463 U.S. at 297. States in such cases have vigorously and successfully resisted counterarguments that parole eligibility rights should be ignored because parole "is simply an act of executive grace" that gives rise to "no constitutionally enforceable interest," thus justifying nothing more for the prisoner than "speculation that he might be pardoned before the sentence [is] carried out." *Rummel v. Estelle*, 445 U.S. 263, 293-94 (1980) (Powell, J., dissenting). The states cannot have it both ways. They cannot in fairness assert that the discretionary nature of parole rights removes them from Ex Post Facto Clause protection, even while urging—with success in this Court—that those same discretion-laden rights have dispositive significance in saving state sentences from Eighth Amendment attack. *Id.* at 281 (rejecting Eighth Amendment challenge to life sentence subject to parole imposed on three-time violator of criminal fraud and check forgery laws involving $80, $26 and $120; "a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life").

the future—are intrinsically fraught with peril. That peril arises because the "parole-release decision . . . is . . . subtle and depends on an amalgam of elements, some of which are factual but many of which are purely subjective. . . ." *Greenholtz*, 442 U.S. at 9. *See also id.* at 8 (noting that parole decisions involve "an 'equity' type judgment" that "involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker"). Moreover, the danger of faulty prediction is particularly acute in Georgia because Parole Board members, who now may put off reconsideration decisions for eight years, themselves serve at most for seven-year terms. Ga. Const. Art. IV, § II, ¶ 1.

In practical effect, the eight-year rule creates a very real likelihood that a prisoner will receive, over a 15-year period, only one reconsideration in place of a previously provided-for five. Given the continuous membership changes of the Parole Board and the fact that "parole release decisions are inherently subjective and predictive," *Board of Pardons v. Allen*, 482 U.S. 369, 374 (1987), the consequences of this five-for-one tradeoff are apparent. Such a profound reformulation of reconsideration rights creates at least a "sufficient *risk* of increasing the measure of punishment" for parole-eligible life-term prisoners to violate the Ex Post Facto Clause.

The discretionary nature of parole rights in Georgia cannot be divorced from this Court's recognition that parole is "the normal expectation" for prisoners with eligibility to receive it. *Solem*, 463 U.S. at 300.[13] In the

[13] A broader problem with the state's "virtually unfettered discretion" argument is that it misses the crux of the Ex Post Facto Clause prohibition. For example, state legislatures have "virtually unfettered discretion" to fix criminal sentences. But that fact does not allow state legislatures retroactively to make more severe a sentence that the legislature had fixed before the crime was committed. Indeed, the whole point of the Ex Post Facto Clause is to prohibit just such would-be exercises of "discretion." *See Weaver*, 450 U.S. at 29 ("[a] law need not impair a 'vested right' to violate the ex post facto prohibition"); *id.* at 29-30 ("[e]ven if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense").

Solem case, Chief Justice Burger was so emphatic on this point that he declared that: "[o]nly a fraction of 'lifers' are not released within a relatively few years" after they "become eligible for parole." *Id.* at 316. In Georgia, the prospect of prolonged delays in parole considerations for all life prisoners—from a 3, 6, 9 year pattern to a pattern of 8, 16, 24—does more than create a "sufficient risk" that prisoner release dates will be pushed back. It all but guarantees that result.[14]

In the end, the reason why the Ex Post Facto Clause invalidates Georgia's eight-year rule is simple. A retroactively applicable law offends the Constitution if it "increases the *penalty* by which a crime is punishable." *Morales*, 514 U.S. at 507 n.3 (emphasis added). And "only an unusual prisoner could be expected to think that he was not suffering a *penalty* when he was denied

[14] To be sure, the current Georgia Parole Board may take an intensely negative view of parole. But a present-day embrace of a non-historical perspective cannot serve to diminish Georgia prisoners' constitutional rights—particularly because it is unfair and unfounded to assume that the same negative stance will persist three years, five years or eight years hence. During such a lengthy period of time, a great deal can happen. Prison overcrowding may force more parole grants; court orders may be entered; new research may suggest that factors other than the nature of the prisoner's offense (such as prisoner age, demonstrated good behavior, employability or family support structure) are the best indicators of parole suitability; or newly appointed parole board members may independently reach similar conclusions. In effect, the eight-year rule fences out all prisoners it affects from receiving the benefit of any such future development.

eligibility for parole." *Warden v. Marrero*, 417 U.S. at 662 (emphasis added). The Board suggests that its eight-year rule does not adversely affect a prisoner's "eligibility for parole" because it leaves in place the prisoner's initial eligibility date and the substantive criteria by which parole decisions are made. But this argument glorifies form over substance in violation of the cardinal principle that the Ex Post Facto Clause pays no heed to the "technical" and "sophistic." *Dobbert*, 432 U.S. at 297.[15] Parole eligibility exists only if parole eligibility is considered. By massively altering prisoners' entitlements to regular, triannual evaluations of their claims for parole, the Board has "effectively postponed" when a prisoner "become[s] eligible for early release" in violation of the Ex Post Facto Clause. *Lynce*, 519 U.S. at 896.

II. THIS COURT'S DECISION IN *MORALES* CONFIRMS THAT GEORGIA'S RETROACTIVE APPLICATION OF THE EIGHT-YEAR RULE VIOLATES THE EX POST FACTO CLAUSE.

Georgia's retroactive application of its eight-year rule fails the ex post facto analysis articulated by this Court in *Morales*. In *Morales*, this Court upheld the retroactive application of a change to California's parole reconsideration rules. The Court rested its ruling on pointedly narrow and practical grounds. There was, this Court emphasized, "*no reason* to conclude that the amendment

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[15] *See, e.g., Beazell v. Ohio*, 269 U.S. 167, 170 (1925) (Ex Post Facto Clause's limits apply to "laws, whatever their form"); *Miller*, at 430, *quoting Dobbert* at 293 (Ex Post Facto Clause focuses on "matters of substance"); *Weaver*, 450 U.S. at 24 ("it is the effect, not the form, of the law that determines whether it is ex post facto"); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867) (Under the Ex Post Facto Clause, "what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows.").

will have *any effect* on *any prisoner's* actual term of confinement. . . ." 514 U.S. at 512 (emphasis added).

Recently reiterating that the principle of *Morales* reaches no further, the Court noted that *Morales* "rested squarely on the conclusion that 'a prisoner's ultimate date of release would be entirely unaffected by the change in timing of suitability hearings.'" *Lynce*, 519 U.S. at 444. The Court in *Morales* reached its conclusion only after a thorough comparison of the old California parole provisions and the new. The Court recognized that "the question of what legislative adjustments 'will be held to be of sufficient moment to transgress the constitutional prohibition' must be a matter of 'degree.'" 514 U.S. at 509 (quoting *Beazell v. Ohio*, 269 U.S. at 171). The Court focused meticulously on the distinctive "circumstances" presented by the California parole reform. The Court expressed "no view as to the constitutionality of any of a number of other statutes that might alter the timing of parole hearings under circumstances different from those presented here." *Id.* at 510. The Court went on to uphold the California revision solely because it "creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes . . ." 514 U.S. at 514. *Accord, Lynce*, 519 U.S. at 450 (Thomas, J., concurring).

The facts presented in this case stand in stark factual contrast to those considered in *Morales*. Indeed, this case differs from *Morales* in at least five critical respects. First, the duration of the tolerated delay in the two cases is fundamentally different. In *Morales*, California granted authority to postpone parole reconsiderations for at most two years, creating the possibility that reconsideration intervals would move from every one to every three years. Here, in contrast, the Board claims power to delay recon-

siderations for *five* years, thus extending reconsideration intervals from every three to every eight years. In finding *Morales* to be "wholly distinguishable," the Circuit Court bluntly observed that "eight years is a long time." *Jones*, 164 F.3d at 595. While Petitioners ridicule this statement, Pet'r Br. at 27, the Circuit Court's reasoning is a valid recognition of the risks inherent in a deferral of reconsiderations for an extended period of time. As the Circuit Court noted, "[m]uch can happen in the course of eight years to affect the determination that an inmate would be suitable for parole." *Jones*, 164 F.3d at 595.

Second, the Court in *Morales* emphasized that the new California rule applied only to a distinctively "narrow class of prisoners"—namely, multiple murderers—for whom inevitably the "likelihood of release on parole is quite remote." 514 U.S. at 510. In contrast, as the Circuit Court emphasized, Georgia's parole provisions apply to *all life sentenced inmates*, a class which encompasses inmates convicted of a broad range of crimes. Carefully canvassing local law, the Circuit Court concluded that the affected class of prisoners is extremely broad. It might include:

> prisoners convicted of murder . . . felony murder . . . rape . . . armed robbery . . . kidnapping for ransom . . . hijacking an aircraft . . . more than one count of child molestation . . . perjury that was the cause of someone else being sentenced to death . . . more than one count of possession or use of a machine gun, sawed-off rifle, sawed-off shotgun, or a firearm equipped with a silencer during the commission or attempted commission of a series of enumerated offenses [16]; and more than one count of a series of

[16] The Court noted that these enumerated offenses include aggravated assault; aggravated battery; robbery; armed robbery; murder or felony murder; voluntary manslaughter; involuntary

> prohibitions on the manufacture, possession, sale or distribution of certain controlled substances.

Jones, 164 F.3d at 593-94 (citations omitted).

Drawing on this survey of Georgia law, the Court of Appeals had no difficulty concluding that: "The set of inmates whose parole considerations will be affected . . . must . . . be comprised of many inmates who can at some point expect to be paroled." *Id.*[17] It is the traditional practice of this Court to defer to such state-law-based conclusions of circuit courts. *See, e.g., Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998). But wholly apart from the appropriateness of such deference, the lower court's reasoning squares exactly with what this Court has said before: that, "[a]ssuming good behavior, [parole] is the normal expectation in the vast majority of cases." *Solem*, 463 U.S. at 300.

Third, the Court in *Morales* repeatedly emphasized that the California Parole Board's decision to postpone any reconsideration hearing was marked by elaborate procedural protections. The Court relied, for example, upon the fact that the Board was required to conduct a "full hearing and review" of all relevant facts (including a particularized inquiry, in addition to that for the parole denial, with respect to facts supporting deferral of future

manslaughter; sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances; terroristic threats or acts; arson; influencing witnesses; and participation in criminal gang activity. *Jones*, 164 F.3d at 594 n.6.

[17] Although Petitioners claim that the rule is in fact more limited, arguing that it applies only to prisoners whose "heinous crimes and multiple-offender status gives them, in the Board's opinion, virtually no near-term likelihood for parole. . ." (Pet'r Br. at 15), that is decidedly incorrect under the terms of the Policy Statement, upon which they rely so heavily for other propositions. (J.A. 56).

hearings). 514 U.S. at 511. California's hearing process also protected the inmates by: (1) allowing the inmate to "be present, to ask and answer questions, and to speak on his or her own behalf," (2) providing a stenographic record of all proceedings, (3) requiring that either legal counsel or another suitable representative participate and insure that all facts relevant to the decision were presented at the hearing, and (4) requiring the Board to send the prisoner a written statement of the reasons for denial and a suggestion of activities that would benefit the inmate during his incarceration. Cal. Penal Code § 3041.5. After conducting this hearing, the Board was required to make a specific determination that "it is not reasonable to expect that parole would be granted at a hearing during the following years," and to "state[] the basis for the findings." 514 U.S. at 511. The use of these elaborate procedural protections in California led the Court in *Morales* to conclude with assurance that a decision to defer reconsideration was "no arbitrary decision." *Morales*, 514 U.S. at 511.

In contrast, the Georgia parole system utterly fails to provide any procedural safeguards to prevent inmates from being harmed by lengthy postponements of their parole consideration dates. Georgia's Parole Board provides no live hearing or even a personal meeting with Parole Board members. In addition, Georgia inmates who are denied parole are given only the most cursory reasons for the decision, and are given no guidance at all as to how to improve their future chances for parole. (J.A. 52-54). As a result, the Georgia Board has a much-reduced ability to gauge an inmate's future potential for parole in comparison to the California system.[18]

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[18] Petitioners argue that any reliance on the nature of the hearing is inappropriate because, in Georgia, the Parole Board "is under no requirement, either constitutional or statutory, to *ever* hold parole consideration hearings or make particular findings." Pet'r Br. 26 (emphasis added). This argument confuses the requirements of procedural due process (and of the Georgia Code) with those of the Ex Post Facto Clause. Applying the latter clause, this Court in *Morales* could not have been more explicit in declaring that the procedural carefulness of the postponement hearing is important (as common sense suggests it is) because safeguards against unjustified postponements eliminate the risk of increased punishment that arises when unjustified postponements occur. In short, under *Morales* the elaborateness of an inmate's hearing rights (whether or not required by procedural due process or by statute) "provides assurance that any postponement decision [will] be well-founded." *In re Jackson*, 703 P.2d 100, 106 (Cal. 1985) (upholding California regime later endorsed in *Morales*).

The Court in *Morales* relied on a fourth fact that clearly distinguishes that case from this one: in California, a prisoner's actual release date typically comes "at least several years after a finding of suitability." 514 U.S. at 513. The significance of this fact is that the California Board has the opportunity to cure any error that might otherwise occur due to the delay of a suitability hearing by advancing the prisoner's release date. *Id.* In contrast, there is no evidence in this record, or any indication in the Georgia statutes or parole rules, that inmate releases are delayed for any significant period of time following a finding of suitability for parole. In any event, errors resulting from a five-year delay obviously cannot be corrected. It is telling that the Petitioners here do not even try to advance the same sort of "no harm no foul" defense that occupied so much of this Court's attention in *Morales*. *See* 514 U.S. at 513.

A fifth and final distinction between *Morales* and this case arises out of the difference in the ways the California and Georgia reforms came into existence. In *Morales*, this Court noted that the State Legislature, upon investigation, concluded that the California amendment directly alle-

viated a needless administrative burden that arose from holding live, full-blown, annual parole hearings. This Court recognized the plausibility of this benign purpose and found that the Board's retroactive application of the changed parole rules was "carefully tailored" to eliminate the problem without harming the inmates. 514 U.S. at 511.

In contrast, there is no evidence that retroactive application of Georgia's amended policy will result in significant administrative savings, since the change only delays reviews of inmate files. Moreover, there is no evidence that reducing administrative burdens was the intent of the eight-year rule. In fact, Board statements to the popular media indicate otherwise, as does the language in the Policy Statement on which Petitioners so heavily rely.[19] In light of these materials, in clear contrast to *Morales*, the eight-year rule and its retroactive application could be viewed as having the primary purpose of lengthening life inmates' terms of incarceration, in which

[19] The Policy Statement asserts that the eight-year rule's purpose is to "establish the maximum possible interval between parole denials and reconsideration in a Life Sentence Case." (J.A. 56). In a Parole Board Press Release it issued in 1998, the Board issued the following statement: "Since 1991 the Board has steadily and consistently amended and refined its guidelines and policies to provide for lengthier prison service for violent criminals." State of Georgia Board of Pardons and Paroles, *News Releases*, (visited December 5, 1999) <http://www.pap.state.ga.us/NRFrames.htm> (Jan. 2, 1998 release, "Policy Mandates 90% Prison Time For Certain Offenses"). Further, in an article published in the Savannah Morning News, former Parole Board Chairman James T. Morris was quoted as saying: "We established [in-house classifications for life-sentenced inmates] in 1985 and it's just started to catch up to us in the last three years . . . It's now beginning to show the toughness we intended. And I think you're going to continue to see the time that lifers serve continue to go up". *Savannah Morning News*, July 25, 1993, p. 8A. Of course, given the procedural posture of this case, Respondent has not been able to conduct discovery with respect to these or other statements.

case Georgia's eight-year rule revision would violate the Ex Post Facto Clause wholly apart from its "consequences," *Lynce*, 519 U.S. at 442, and "impact," *id.* at 443, because it appears that "in changing that sentencing scheme, the [parole board] *intended* to lengthen the inmate's sentence." *Id.* (emphasis added).

Petitioners' effort to invoke the principle of *Morales* hinges on the only arguable similarity between the amended parole legislation in that case and this one—the purported opportunity of Georgia inmates to request an expedited consideration in the event there has been a change in the inmate's circumstances.[20] Even assuming that an opportunity generally exists in Georgia (*but see* note 20, *supra*), this single similarity does not outweigh the many dissimilarities between this case and *Morales*. Indeed, four separate reasons show why Georgia's new "changed-circumstances" approach reduces the impact of eight-year rule in only the most modest way, if it reduces that impact at all.

First, the changed-circumstances approach places the burden to request expedited consideration on the inmate who previously would have been automatically entitled to such review.[21] Rather than being routinely considered, the

[20] The opportunity to request expedited consideration is found nowhere in the Parole Board's rules. Instead, the Board relies on its Policy Statement in an attempt to salvage a regulation that on its face does not come close to passing constitutional muster. As the Circuit Court noted, "[t]his policy does not sufficiently mitigate the defects in the regulation itself to defeat an ex post facto challenge. Policy statements, unlike regulations, are unenforceable and easily changed, and adherence to them is a matter of the Board's discretion. These are qualities that caution against treating their contents as if they had the authority of officially promulgated statutes or regulations." *Jones*, 164 F.3d at 595.

[21] Courts have held that imposition of new laws that shift the burden of proof or production to a defendant violate the Ex Post

prisoner must now show there is something so distinctively exceptional about that prisoner's case that it should be singled out from all others for special treatment. No matter how receptive to parole a later constituted parole board might be, it is counter-intuitive to believe that a Board will often approve requests for early review. Thus, the eight-year rule—coupled only with the conjectural possibility of expedited reviews based on changed circumstances—departs radically from the three-year rule because it wholly changes the decisional baseline from which the Parole Board operates. *See, e.g., Weaver*, 450 U.S. at 35 (where state retroactively removes fixed entitlement to earn gain-time credits, Court finds no adequate substitute in new program affording gain-time credits because "the award of [them] is purely discretionary" and requires inmates "to satisfy . . . extra conditions"); *Miller*, 482 U.S. at 432-33 (rejecting argument that judge's ability to depart from new and more onerous presumptive sentencing range negated Ex Post Facto Clause problems because limitations on judge's ability to make departure "substantially disadvantaged" the defendant).

Second, for an inmate to be protected against the possibility of a Board postponement, the inmate must articulate the change of circumstances in a manner that is persuasive to the Parole Board. It will be difficult for most, and impossible for many, inmates who are not entitled to legal counsel and may be illiterate or unskilled in their writing ability to persuasively articulate the changed circumstances. Inmates serving life sentences, sequestered

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Facto Clause. *See, e.g. State v. Niska*, 514 N.W.2d 260, 265 (1994). Even more important, this Court's precedent looks askance at rule changes of this kind. In this case, as in *Miller*, the substituted changed-circumstances rule does not "simply provide flexible 'guideposts' for use in the exercise of discretion." 482 U.S. at 435. Rather it "create[s] a high hurdle that must be cleared before discretion can be exercised" at all. *Id.*

in high security prisons, with few privileges, no legal counsel, and poor communication skills are hardly in a position to present their own cases under such a rule.

Third, reliance on a changed-circumstances review scheme presumes that an inmate is in a position to recognize when relevant circumstances have changed and then to highlight those changes in an individual changed-circumstances petition. This often will not be the case, however, as inmates are not given guidance by the Board as to what steps they might take in the future to secure parole release. Further, parole decisions may be made for reasons having nothing to do with the individual inmate's circumstances. Instead, an inmate's chances for parole may depend largely on how that inmate's circumstances compare to other similarly situated inmates in the parole consideration pool. Other relevant changes may concern such matters as overcrowding or changes in Parole Board membership or political philosophy.

Fourth and finally, there is no evidence whatsoever to indicate a potential for expedited reviews in fact meaningfully offsets (or even reduces) inmates' retroactive loss of triannual reconsideration rights. Common sense provides a basis for skepticism in this regard. Given the Board's ardent protestations that it is too busy to conduct triannual reviews, it would be surprising to find that it often engages in individualized expedited reconsiderations based upon changed circumstances.

In sum, Georgia's parole rules are so vastly different from those considered in *Morales* that it is not surprising the Circuit Court reached a different result in this case. Indeed, *Morales* requires a different result.[22] There, for

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[22] The weaknesses of Petitioners' attempted reliance on *Morales* is underscored by their suggestion that the Court should essentially ignore the underlying reasoning of that case. Thus, referring to

each of the reasons identified above, the Court found California's modest parole-reconsideration reform was tailored to eliminate costly full-scale hearings that entailed nothing more than "futility" and "going through the motions." Even faced with such circumstances, the Court perceived itself to be facing a "close question" in *Morales*. *See, e.g., Lynce*, 519 U.S. at 450 (Thomas, J., concurring). The same cannot be said here. Indeed, every element of the reasoning of *Morales* demonstrates why the Court should find an Ex Post Facto Clause violation on the starkly contrasting facts of this case.

III. CONSTITUTIONAL POLICY CONFIRMS THE INVALIDITY OF GEORGIA'S RETROACTIVE IMPOSITION OF ITS EIGHT-YEAR RULE.

The Ex Post Facto Clause was adopted "to protect future Americans against oppressive, retroactively imposed, legislative enactments." Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1275 (1998). Opposition to ex post facto laws among the framers was strong.[23] As a result, they endorsed with no real controversy a prohibition on such laws that was "sweeping" and "absolute."[24]

Morales, Petitioners argue that "given the paucity of cases that this court can consider each year, its decisions *must* be something more than mere fact-specific rulings." Pet'r Br. at 29 (emphasis in original). Petitioners' you-didn't-really-mean-what-you-said line of reasoning (by which Petitioners mean to say that the Court intended to generally authorize retroactive consideration delays) is particularly ill-suited to *Morales*. In that case, this Court disclaimed in no uncertain terms any intention to uphold reconsideration extensions in cases involving "circumstances different from those present here," *Morales*, 514 U.S. at 509 n.5.

[23] It appears that no dissent at all was voiced at the Constitutional Convention as to the wrongfulness of ex post facto laws. Discussion centered instead on whether any textual treatment of the subject was necessary given the general understanding that such laws were so tyrannical that they "were void of themselves." *William Crosskey, The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws*, 14 U. Chi. L. Rev. 539, 540 (1947) (quoting Oliver Ellsworth). *See* 2 Max Farrand, *The Records of the Federal Convention* 376 (Yale 1966) (setting forth James Madison's notes of Aug. 22, 1787).

[24] On the "absolute" and "sweeping" character of the Ex Post Facto Clause prohibition, *see William W. Crosskey, The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws*, 14 U. Chi. L. Rev. 539 ("thoroughly disapproved"); 549 ("prohibited absolutely," "absolute prohibitions," "sweeping prohibitions").

James Madison described ex post facto laws as "contrary to the first principles of the social compact, and to every principle of sound legislation." He thus deemed the prohibition a "bulwark in favor of personal security and private rights." *The Federalist* No. 44, at 282 (James Madison) (Clinton Rossiter ed. 1961). Alexander Hamilton identified the safeguards against ex post facto laws (along with the protection of habeas corpus and the ban on titles of nobility) as "perhaps greater securities to liberty and republicanism than any [the Constitution] contains." *The Federalist* No. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

This Court's aggressiveness in applying the Constitutional prohibition has sprung in part from its strong textual and historical roots. As observed in *Weaver*, 450 U.S. 39, n.8, "So much importance did the convention attach to [the ex post facto prohibition], that it is found twice in the Constitution."

This Court's watchfulness in guarding against Ex Post Facto Clause violations also comports with its longstanding embrace of a more generalized presumption against retroactive legislation. As this Court recently observed:

> Retroactivity is generally disfavored in the law. . . . "Retroactive legislation," we have explained, "pre-

> sents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."

Eastern Enterprises v. Apfel, 524 U.S. 498, ——, 118 S.Ct. 2131, 2151 (1998) (plurality opinion; citations omitted).[25]

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; *settled expectations should not be lightly disrupted.*

Landgraf v. United States, 511 U.S. 244, 265 (1994) (emphasis added).

In keeping with these purposes, the Ex Post Facto Clause ensures that "legislative enactments . . . permit individuals to rely on their meaning until explicitly changed." *Miller*, 482 U.S. at 430 (*quoting Weaver*, 450 U.S. at 28-29). By retroactively applying the eight-year rule, however, Georgia's Parole Board has disrupted the expectations of those inmates who entered plea agreements with the expectation that they would have reasonable and regular opportunities for parole, and of any judges who have taken this possibility into account in imposing a life sentence rather than a fixed term of years. *See supra* at pp. 7, 13. No less important, the State has

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25 *Accord, id.* at 2158-59 (Kennedy, J., concurring in part and dissenting in part) (ban on retroactive lawmaking fosters "confidence in the constitutional system" and counters the "justified fear that a government once formed to protect expectations now can destroy them"; thus "for centuries our law has harbored a singular distrust of retroactive statutes"); *Id.* at 2163 (Breyer, J., dissenting) (retroactive law "undermines a basic objective of law itself" when it "upsets settled expectations").

profoundly undermined the "settled expectations" of innumerable prisoners who expected, in keeping with then-existing law, to receive parole considerations at regular three-year intervals. *See Greenholtz*, 442 U.S. at 19 (Powell, J., concurring and dissenting) ("when a State adopts a parole system that applies general standards of eligibility, prisoners justifiably expect that parole will be granted fairly and according to law").

Another purpose of the Ex Post Facto Clause is to "guard against the Framers' fears of retroactive penal laws forged by 'hot-blooded' legislatures. . ." Logan, 35 Am. Crim. L. Rev. at 1277. The Ex Post Facto Clause thus protects unpopular groups or individuals from the potentially arbitrary, capricious, and vindictive actions of a powerful state. *See Miller*, 482 U.S. at 429; *Weaver*, 450 U.S. at 29; *see also Landgraf*, 511 U.S. at 266 (noting that government officials, in response to political pressures, "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.").

If the earmarks of retribution ever are present, it must be where, as here, the government targets what is arguably the most politically and socially outcast of all groups: incarcerated "lifers." And concerns with retroactivity surely are at their highest ebb when government policy concerns not mere financial interests, *compare Eastern Enterprises*, 524 U.S. at 498, but the most basic of all human freedoms—freedom from physical restraint.

Maintaining their own would-be argument of policy, Petitioners assert that an affirmance would embroil the judiciary in the sort of "micromanagement" of "parole" and "sentencing procedures" that the Court in *Morales* foreswore. Pet'r Br. at 20. This micromanagement argument, however, is unpersuasive and, in fact, reflects a

basic misunderstanding of *Morales*. If the Court's micromanagement reasoning in *Morales* was meant to condemn all judicial review of retroactive reconsideration rules, then the Court's analysis in that case would have been entirely different. After all, the Court in *Morales* meticulously examined the particular parole reform in that case; emphasized that judicial rulings in this area turned on matters of degree; and carefully left open for further and contextual judicial consideration other reconfigurations of parole reconsideration rights. In short, the sort of "micromanagement" Petitioners condemn is nothing more than the same kind of principled judicial appraisal engaged in by the Court in *Morales* itself.

In addition, the Court in *Morales* voiced concern about judicial "micromanagement" only in the context of rejecting a principle so "expansive" that it would invalidate "any legislative change that has any conceivable risk of affecting a prisoner's punishment." *Id.* at 508. This case, however, does not involve either the invocation of such a principle or the types of reforms that the Court in *Morales* actually meant to exempt from Ex Post Facto Clause attack. Those reforms were:

> such innocuous adjustments as changes to the memberships of the Board of Prison Terms, restrictions on the hours that prisoners may use the prison law library, reductions in the duration of the parole hearing, restrictions on the time allotted for a convicted defendant's right of allocation before a sentencing judge, and page limitations on a defendant's objections to presentence reports or on documents seeking a pardon from the governor.

Morales, 514 U.S. at 508. There are obvious reasons for not applying the Ex Post Facto Clause to changes of this nature. In particular, "it would create endless confusion in legal proceedings if every case was to be conducted

only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose." T. Cooley, *Constitutional Limitations* 272 (1868). There is, however, no problem of "confusion" in setting different reconsideration dates for prisoners whose crimes were created before and after the well-known date on which the eight-year rule was adopted. This is so because, under either the three-year rule or the eight-year rule, the Parole Board must and will fix parole reconsideration dates whenever a denial occurs.

No less important, the "mechanical" reforms that concerned the Court in *Morales, id.*, are different in kind from the rule change at issue here because those reforms do not, even remotely, concern the actual "punishment" meted out by the state. In contrast, precisely because Georgia's eight-year rule alters a numerically measurable temporal dimension of the sentence, it is something more than a "minor" adjustment of sentencing "procedures." 514 U.S. at 508. When we think about sentences we think about time—*i.e.*, how long will, or might, a prisoner serve. Thus, as a matter of common understanding, Georgia's retroactive application of the eight-year rule intrinsically entails an alteration of the "amount," *Beazell*, 269 U.S. at 170, and "measure," *Morales*, 514 U.S. at 510, of an inmate's punishment. It follows that, in a very real way, Georgia's eight-year rule produces what this Court consistently has proscribed: a "change in the *quantum* of punishment attached to the crime." *Dobbert*, 432 U.S. at 294.

Contrary to Petitioner's assertions, application of the Ex Post Facto Clause to this case will not jeopardize the purposes of federalism. Each state remains free to serve as a "laboratory" of "experimentation," *Reeves v. State*, 447 U.S. 429, 441 (1980) (*quoting New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J.,

dissenting)), in the areas of timing parole considerations. A state need only conduct its experiments, as fairness suggests it should, on a prospective basis. Similarly, in pursuing the essential government goal of discouraging crime, states are at liberty to dilute parole rights or to eliminate them altogether, so long as they do so on a prospective basis. But a state has no legitimate interest in "discouraging" the crimes of Respondent and other similarly-situated prisoners whose crimes were committed long ago. *See James v. United States*, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part and dissenting in part).

To be sure, state officials might assert an interest in incapacitating prisoners because of growing fears about criminal behavior, a lost hope in rehabilitative efforts, or a new "get tough" attitude toward crime. If the Ex Post Facto Clause has any purpose, however, it is to bar the expression of precisely these increased-incapacitation policies in after-the-fact enhancements of criminal penalties. *See Lynce*, 519 U.S. at 445 (condemning "retrospective change . . . intended to prevent the early release of prisoners"); *Lindsey*, 301 U.S. at 401 (the Constitution "forbids the application of any new punitive measure to a crime already consummated.").

In the end, the state can, and does, seek to justify its profound retroactive reformulation of prisoners' parole-consideration rights by arguing that the eight-year rule is "cost-effective and efficient." Pet'r Br. at 15-16. Rights protected by the Ex Post Facto Clause, however, are not subject to being put in a balance where they might be outweighed by some such nebulous government interest. And even if they were, a claimed interest in cost-saving and administrative convenience would provide a poor candidate for overriding the Constitution's textually explicit and unequivocally expressed protections against ex post facto

laws. *See Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (rejecting "administrative ease and convenience" as adequate justification even for purposes of intermediate scrutiny under the Equal Protection Clause). This Court has never tolerated trampling on an individual's rights just because it saves a state money to do so.

It is well and good for any state to wage a war on crime, but our Constitution commands that, in such a war, the State must fight fair. The great constitutional prohibitions against ex post facto laws guard against tyranny by establishing a fixed and workable baseline of punishment that potentially overzealous government officials may not breach. That baseline is fixed and workable because it is identifiable by looking to the past. Departing from that baseline (and markedly so in this case) would abridge this Court's past pronouncements, undermine settled expectations, and facilitate the future retrospective imposition of penalties against unpopular groups. *See Miller v. Florida*, 482 U.S. 423, 429 (1987); *Weaver*, 450 U.S. at 29. Instead of following the Board's overreaching reasoning, this Court should abide by its earlier interpretations of the Ex Post Facto Clause and bar the state from retroactively diminishing prisoners' precious parole eligibility rights.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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24

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In The

Supreme Court of the United States

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Petitioners,

v.

ROBERT L. JONES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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30 PP

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED IN THE CASE 1

ARGUMENT 2

I. THE CHALLENGED PROVISION MERELY ALTERS THE MANDATORY PERIODIC PAROLE RECONSIDERATION OF LIFE-SENTENCED INMATES WHO HAVE ALREADY BEEN DENIED PAROLE AND AFFECTS NEITHER PAROLE ELIGIBILITY NOR INITIAL PAROLE CONSIDERATION 2

A. AFFECTED INMATES NEVER LOSE THEIR PAROLE ELIGIBILITY 2

B. RESPONDENT BEARS THE BURDEN OF PROOF 6

II. THE AUTONOMY AND DISCRETION OF GEORGIA'S PAROLE BOARD ARE VITAL FACTORS IN THIS COURT'S DETERMINATION OF THE ISSUES AT BAR 7

III. THIS COURT'S DECISION IN *MORALES* DEMONSTRATES THAT THE APPLICATION OF THE CHALLENGED REGULATION TO RESPONDENT HEREIN DOES NOT VIOLATE THE EX POST FACTO CLAUSE 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Akins v. Snow, 922 F.2d 1558 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991) 2

California Department of Corrections v. Morales, 514 U.S. 499 (1995) 3, 6, 11, 12, 13, 14

Collins v. Youngblood, 497 U.S. 37 (1990) 6

Fletcher v. Williams, 179 Ill. 2d 225 (1997) 12

Freeman v. State, 264 Ga. 27, 440 S.E.2d 181 (1994) 4

Furnari v. Savaras, 914 P.2d 508 (Colo. 1996) 12

Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) 9

Harris v. Wainwright, 376 So.2d 855 (1979) 10

Hill v. Jackson, 64 F.3d 163 (4th Cir. 1995) 12

Jones v. Garner, 164 F.3d 589 (11th Cir. 1999) 6, 12

Jones v. Georgia State Board of Pardons and Paroles, 59 F.3d 1145 (11th Cir. 1995) 8

Jordan v. Tennessee Board of Paroles, 1997 Tenn. App. LEXIS 27 12

Lewis v. Griffin, 258 Ga. 887, 376 S.E.2d 364 (1989) 9

Moore v. Ray, 269 Ga. 457, 499 S.E.2d 636 (1998) 4

Roller v. Gunn, 107 F.3d 227 (4th Cir.), *cert. denied*, 522 U.S. 874 (1997) 12

Shabazz v. Gabry, 123 F.3d 909 (6th Cir.), *cert. denied*, 522 U.S. 1019 (1997) 12, 13

Solem v. Helm, 463 U.S. 277 (1983) 9

TABLE OF AUTHORITIES – Continued

Page

Sultenfuss v. Snow, 35 F.3d 1494 (11th Cir.), *cert. denied*, 523 U.S. 1191 (1995) 8

Tuff v. State, 732 So. 2d 461 (Fla. 1990) 12

Vargas v. Morris, 266 Ga. 141, 465 S.E.2d 275, *cert. denied sub nom. Vargas v. Garner*, 517 U.S. 1108 (1996) 4, 8

Weaver v. Graham, 450 U.S. 24 (1981) 10

STATUTES

Ga. Code Ann. § 17-10-6.1 4

Ga. Code Ann. § 17-10-7 4

Ga. Code Ann. § 42-9-1 8

Ga. Code Ann. § 42-9-42 7

Ga. Code Ann. § 42-9-45 4

Ga. Code Ann. § 50-18-70 2

CONSTITUTIONAL PROVISIONS

Ga. Const. Art. VI, § 2, ¶ 2 .....4, 8

U.S. Const. Art. I, § 10 1

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED IN THE CASE

U.S. Const. Art. I, § 10:

No State shall . . . pass any . . . ex post facto Law. . . .

Ga. Comp. R. & Regs. r. 475-3-.05(2)

(*effective December 1, 1979*) (*now superceded*):

Reconsideration of those inmates who have been denied parole shall take place at least every three years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possibly discouraging diagnostic opinions. (Text set out fully at J.A. 86-87).

Ga. Comp. R. & Regs. r. 475-3-.05(2)

(*effective September 12, 1993*) (*Presently in effect*):

Reconsideration of those inmates who have been denied parole shall take place at least every eight years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possibly discouraging diagnostic opinions. (Text set out fully at J.A. 88-90).

ARGUMENT

I. THE CHALLENGED PROVISION MERELY ALTERS THE MANDATORY PERIODIC PAROLE RECONSIDERATION OF LIFE-SENTENCED INMATES WHO HAVE ALREADY BEEN DENIED PAROLE AND AFFECTS NEITHER PAROLE ELIGIBILITY NOR INITIAL PAROLE CONSIDERATION.

In Georgia's parole scheme, inmates serving sentences of either a term of years or life imprisonment attain eligibility for parole, if at all, by operation of law after the service of a designated portion of their sentence. In the case of Respondent, the period of time served prior to parole eligibility was seven years.

A. Affected Inmates Never Lose Parole Eligibility.

The arguments advanced by Respondent, and the decisions of the Eleventh Circuit in the case *sub judice*, and in *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991), are premised upon the notion that life-sentenced inmates, after attaining parole eligibility pursuant to law, lose that eligibility during the term of their "set-off" between periodic mandatory parole reconsiderations. This premise is erroneous.[1]

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[1] Petitioner has lodged with the Clerk of this Court certain documents obtained pursuant to the Georgia Open Records Act, Ga. Code Ann. § 50-18-70, *et seq*. These documents are lodged in response to the inclusion of statistics and other materials *dehors* the record by Respondent and his *amici*, so that this Court might have an accurate indication of the operation of Georgia's parole system. Document Number One of those lodged documents, which is annexed to this brief as Appendix One, lists anecdotal examples of ten life-sentenced inmates from Georgia's prison system whose parole was reconsidered by the State Board of Pardons and Paroles ("the Board") exceptionally in advance of their previously-established reconsideration set-off date. The information concerning the ten inmates chronicled therein, five of whom were actually released from confinement, plainly demonstrates that the opportunity for early reconsideration represents no mere unrealistic "potential" for review, as Respondents and the Circuit Court have maintained. Far from being a circumstance in which "a prisoner who experiences a drastic change in circumstances [being] precluded from seeking an expedited hearing from the Board," the Board's authority to review inmates eligible for parole at any time is a vital, and demonstrable, part of the Board's practice. *See California Department of Corrections v. Morales*, 514 U.S. 499, 512 (1995).

What has been described by Respondent and his *amici* as an "eight-year rule" involves no such inflexibility. In the application of the rule at issue in this case, it is only the periodic mandatory reconsideration event that is being delayed, not eligibility for parole.

The Board's determination of parole, and if denied its decision as to the length of an inmate's set-off period, are individualized determinations by the Board based wholly on the facts and circumstances peculiar to that inmate.[2] Thus the Board's application of the challenged regulation is unique to each inmate it considers. Therefore, the notion of an "eight-year rule" is fallacious.

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[2] Document Two lodged with the Clerk of this Court, and annexed hereto as Appendix Two, is a graphic representation of this fact. Clearly, as more than thirty percent of life-sentenced inmates denied parole in fiscal year 1999 were set off for less than eight years (not including those 90 life-sentenced inmates to whom parole was granted), the Board's rule is manifestly being applied precisely as the record below demonstrated that it was. J.A. 49-50.

The inquiry of the Board is, again, based upon an individualized examination of a particular inmate's crimes, conduct, and future prospects (among other things) which is then expressed in an individualized determination as to how long *mandatory* reconsideration should be set-off. This is so because the rule and the implementing and explanatory policy statement are merely further manifestations of the Board's discretion over this life-sentenced inmate. This rule in no way, as Respondent intimates, limits the Board's discretion or ability to parole any inmate.

Respondent would have this Court believe that the Board somehow makes certain inmates "ineligible" for parole by setting-off their mandatory reconsideration for a determinant period. Such an assertion is counter-intuitive. As noted above, eligibility for parole is set in Georgia *not by the Board*, but by the Georgia Constitution and Georgia statutes. *See, e.g.*, Ga. Code Ann. §§ 42-9-45, 17-10-6.1, 17-10-7, Ga. Const. Art. IV, § 2, ¶ 2. *See also Freeman v. State*, 264 Ga. 27, 440 S.E.2d 181 (1994); *Vargas v. Morris*, 266 Ga. 141, 465 S.E.2d 275, *cert. denied sub nom. Vargas v. Garner*, 517 U.S. 1108 (1996); *Moore v. Ray*, 269 Ga. 457, 499 S.E.2d 636 (1998). It is not within the power of the Board, under Georgia law, to remove such eligibility once conferred. Rather, the Board has constitutional and statutory discretion to parole, or deny parole to, *any inmate within its jurisdiction*.

Respondent's argument regarding this alleged ineligibility for parole is premised upon the fallacy that inmates affected by this rule are "fence[d] out" of or "hermetically seal[ed] off" from parole reconsideration. Such assertions are patently erroneous.

In fact, as noted above, the Board always retains the authority to parole any inmate within its jurisdiction regardless of the existence of the Board policy derided by Respondent and the Eleventh Circuit. Thus, the Board's policies and rules provide for regularly scheduled parole reconsiderations *and* for "expedited parole reviews in the event of a change in [the inmate's] circumstance or where the Board receives new information that would warrant a sooner review." J.A. 56.

Those statements of policy merely attempt to describe the process by which the Board will exercise its discretion to parole or not parole an inmate. The Board has in no way limited its own discretion over this ultimate decision. In fact, this rule change enhanced the Board's discretion by allowing it, as noted previously in Petitioner's initial brief before this Court, to focus its limited resources and time upon those inmates who do, in the Board's analysis, have some near-term likelihood for parole.

The challenged rule is not a static measure by which all inmates are judged unyieldingly. Instead, it is a vital instrument of the Board's discretion, used in conjunction with the Board's determination of whether to parole. The set-off is precisely what the Board determines it to be as to each particular inmate, whether it be one year, three years, or (as with Respondent) eight years, depending upon the Board's individualized assessment of that inmate's circumstances.

For Respondent (a double-murderer and previous escapee), the present regulation *is*, without doubt, an "eight-year rule." What this demonstrates, however, is

merely that the rule in no way limits the Board's ability to make the individual decision in any single inmate's case to parole or not parole.

B. Respondent Bears the Burden of Proof.

Respondent herein urges this Court to avert its gaze from the effect of the rule upon him, and rather review its effect upon all similarly-situated inmates. This argument begs the question, however, of how this rule can be examined without application. Respondent's argument rings hollow in light of this Court's admonition in *Morales*, quoted incompletely by Respondent, that "[a]lthough we have held that a party asserting an ex post facto claim need not carry the burden of showing that he would have been sentenced to a lesser term under the previous statutory scheme, . . . we have *never* suggested that the challenging party may escape the ultimate burden of establishing that the measure of punishment itself has changed [emphasis added]." *Id.*, 514 U.S. at 510, n.6.

Thus, contrary to Respondent's urging, he may not merely invoke the words "ex post facto" as though reciting some incantation, and thereby be relieved of any burden of persuasion. This, too, was the error of the Circuit Court below, in that it erroneously shifted the burden of proof to Petitioner. *See, e.g., Jones v. Garner*, 164 F.3d at 595-96. To do as Respondent suggests, and as the Circuit Court did, effectively "eviscerate[s] the view of the Ex Post Facto Clause that [the Court] reaffirmed in Collins [*v. Youngblood*, 497 U.S. 37 (1990)]." *Morales*, 514 U.S. at 510, n.6.

Respondent's complaints that his heinous crimes should be removed from consideration, while predictable, fail to reckon with the reality that it is the facts of these very crimes which the Board must consider in deciding whether Respondent ever leaves incarceration as a parolee. J.A. 52-4. How, then, can this Court or any other do as Respondent wishes?

II. THE AUTONOMY AND DISCRETION OF GEORGIA'S PAROLE BOARD ARE VITAL FACTORS IN THIS COURT'S DETERMINATION OF THE ISSUES AT BAR.

Respondent contends that the question of whether there exists a reasonable expectation of parole is inappropriate, and is belied by "real-world conditions." Resp. Br. at 4. Respondent's attempts to substitute "real-world conditions" for the law are without merit. Since Respondent is fully aware that there exists no lawful basis upon which any life-sentenced inmate can *ever legitimately expect* to be paroled, he attempts to substitute so called "real-world conditions" for any legitimate expectation of parole.

Ultimately, however, the length of time actually served prior to being paroled by any single inmate, or artificial grouping of inmates, is irrelevant. The law requires, and the Board conducts, individualized determinations of parole suitability for each inmate based upon his or her criminal history, institutional conduct, and a variety of other factors. *See, e.g.*, Ga. Code Ann. § 42-9-42. Respondent's attempts to use some amalgamation of these individual decisions to create what amounts

to a fictionalized "real-world" is wholly unsupported by the law, and can provide no basis for relief.

It is the individual determination of a particular inmate's parole suitability which leads to a decision as to whether that inmate is to be paroled. Likewise, it is the individualized determination of a particular inmate's circumstances which lead, if that inmate is denied parole, to a decision by the Board as to how long that inmate's reconsideration is to be set-off. Thus, whatever hope Respondent or any other life-sentenced inmate has that they will be paroled is merely that: hope. It is not based in law.

As Petitioner has noted previously, Georgia's Board of Pardons and Paroles is the sole seat of all executive clemency powers in the State. Ga. Const., Art. IV, § 2, ¶ 2. Any attempt by the General Assembly to limit the discretion of the Board to parole inmates within its jurisdiction would violate the separation of powers provisions of Georgia's constitution. *Id. See also* Ga. Code Ann. § 42-9-1.

Moreover, the Eleventh Circuit has previously, on two occasions, reviewed Georgia's parole system and has found, *as a matter of fact*, that the "substantial discretion [inherent in Georgia's parole system] belies any claim to a reasonable expectation of parole." *Sultenfuss v. Snow*, 35 F.3d 1494, 1502 (11th Cir.), *cert. denied*, 513 U.S. 1191 (1995). Similarly, in *Jones v. Georgia State Board of Pardons and Paroles*, 59 F.3d 1145 (11th Cir. 1995) the Eleventh Circuit again described the "virtually unfettered discretion" exercised by the Board. *Id.* at 1150. Similarly, Georgia's own courts have consistently upheld the discretionary nature of Georgia's parole system. *See, e.g., Vargas*

v. Morris, 266 Ga. 141, 465 S.E.2d 275 (1996); *Lewis v. Griffin*, 258 Ga. 887, 376 S.E.2d 364 (1989).

Respondent attempts to bolster his claim of a "real-world" expectation of parole by reliance upon this Court's decision in *Solem v. Helm*, 463 U.S. 277 (1983). Justice Powell's description therein of parole as the "normal expectation in the vast majority of cases" is inapposite to the case at bar as the system from which that "expectation" comes "details the standards and procedures applicable" to parole consideration. *Id.*, at 300. Further, the Court's description relies in part upon *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), which involved a parole system found to create an expectation of parole.

By contrast, Georgia's parole scheme is akin to the Court's description of commutation as "an ad hoc exercise of executive clemency [wherein a] governor [in that case] may commute a sentence at any time for any reason, without reference to any standards." *Solem*, 463 U.S. at 301. As noted herein above and in Petitioner's initial brief before this Court, this description is particularly apt given the constitutional and statutory foundation for Georgia's parole scheme, as well as the descriptions given it by numerous reviewing courts. Thus, it is apparent that Respondent's description of a "real world" expectation of parole is both factually and legally without merit.

Respondent claims that the autonomy of the Board and the fact that the law is devoid of any basis for his expectation for parole do not matter, as these concerns are not relevant to ex post facto considerations. The language which Respondent has quoted from this Court's

decision in *Weaver v. Graham*, 450 U.S. 24 (1981), is inapposite, however, as this Court was there dispelling the notion, advanced by the Florida Supreme Court, that "gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified or denied." *Harris v. Wainwright*, 376 S.E.2d 855, 856 (1979).

The change at issue in that case demonstrably lengthened the inmates' sentences requiring them to "earn" *days off their sentences*, rather than receiving them automatically as they had done previously. *Weaver*, 450 U.S. 30, n.13. Thus, although the "right" to gain time in *Weaver* was not "vested" because it could be taken away, the change in the law therein challenged was violative of the Ex Post Facto Clause because it required inmates to earn actual time off their sentences which they previously could have kept merely by not misbehaving. *Id.*

Here, by contrast, the change is merely one of how frequently the Board must engage in a mandatory reconsideration of an inmate's parole, based upon the individualized determination by the Board as to a particular inmate's near-term likelihood for parole. Not only does Respondent not have a right to parole, he does not have a reasonable expectation of parole based upon either the law or "real-world" experience. Thus, this criticism is wholly inapposite.

Ultimately, this Court's ex post facto analysis in this case must focus upon how, if at all, an inmate's sentence is lengthened. Here, the inmate's *mandatory* parole reconsideration schedule has gone from three years to eight years, but that "extension" is the result of an individualized determination of *that inmate's* circumstances made

by the body which has the ultimate decision-making power over whether that inmate is ever released from prison. That inquiry must inexorably lead to the logical conclusion that any notion that the sentence is measurably lengthened is based not upon fact but upon "mere speculation." Thus, there can be no ex post facto violation here.

Obviously, there can be no principled argument that the Board can be prohibited from applying the amended rule prospectively to those inmates whose crimes were committed subsequent to its promulgation. However, under Respondent's theory, in order to apply this rule retrospectively and comply with the fact-bound application of this Court's decision in *Morales* advanced by Respondent and utilized by the circuit court, Georgia's parole board must effectively divest itself of large portions of its constitutionally and statutorily-vested discretion and autonomy.

Thus, Respondent would apparently have the Board afford an inmate more "procedural safeguards" at a parole *reconsideration proceeding* than that required at an initial parole consideration proceeding in order to comply with their fact-bound *Morales* analysis. Clearly, this argument is counterintuitive.

III. THIS COURT'S DECISION IN *MORALES* DEMONSTRATES THAT THE APPLICATION OF THE CHALLENGED REGULATION TO RESPONDENT HEREIN DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

While Respondent urges this Court to effectively limit its decision in *Morales* to its facts based, *inter alia*, upon such nebulous notions as "Constitutional policy" reasons, it is only the Circuit Court below which has adopted such a fact-bound interpretation of this Court's precedents.[3] Although Respondent nominally seeks application of the *Morales* test to the case at bar, it is merely the erroneous fact-bound rote comparison of Georgia's law to that of California which Respondent seeks.

Initially, Respondent complains that the "duration of tolerated delay is fundamentally different" between the two systems. Resp. Br. at 26. Respondent and the Circuit Court below "warn" that "much could happen" during that interval. Resp. Br. at 27, quoting *Jones*, 164 F.3d at 595. While this is true, it is equally true of any interval between mandatory reconsiderations. Thus, the Board's authority, based in law, recognized in policy, and carried out in practice, is brought to bear to consider early those

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[3] *See, e.g., Hill v. Jackson*, 64 F.3d 163 (4th Cir. 1995); *Roller v. Gunn*, 107 F.3d 227 (4th Cir.), *cert. denied*, 522 U.S. 874 (1997); *Shabazz v. Gabry*, 123 F.3d 909 (6th Cir.), *cert. denied*, 522 U.S. 1019 (1997); *Furnari v. Savaras*, 914 P.2d 508 (Colo. 1996); *Tuff v. State*, 732 So. 2d 461 (Fla. 1990); *Fletcher v. Williams*, 179 Ill. 2d 225 (1997); *Jordan v. Tennessee Board of Paroles*, 1997 Tenn. App. LEXIS 27.

inmates who have experienced a "change in their circumstances or where the Board receives new information that would warrant a sooner review." J.A. 56. *See also* Appendix One.

Interestingly, while Respondent readily acknowledges the "obvious reasons for not applying the ex post facto clause to" "such innocuous adjustments as changes in the membership of the Board . . . (Resp. Br. at 41, 42, quoting *Morales*, 514 U.S. at 508)," Respondent nonetheless feels free to argue that an important reason for requiring earlier mandatory reconsideration is "the continuous membership changes of the parole board." Resp. Br. at 22; *see also* Resp. Br. at 23, n.14.

Respondent's argument herein is based, as was the Circuit Court's erroneous holding below, upon the fallacious assumption that more frequent *mandatory* parole reconsideration leads to an earlier release date. Such a premise has been rejected elsewhere,[4] and is at best questionable based upon this Court's statement in *Morales* that "[t]he amendment has no effect on the date of any prisoner's initial parole suitability hearing; it affects the timing only of the subsequent hearings." *Id.* at 511. Respondent's assumption cannot be proven, and is thus based solely upon "the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment." *Id.* at 509.

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[4] "There exists no legal nexus between the decrease of regularly scheduled parole hearings and eligibility for parole." *Shabazz v. Gabry*, 123 F.3d 909, 914 (6th Cir.), *cert. denied*, 522 U.S. 1019 (1997).

Respondent next complains that the class of inmates to whom Georgia's rule applies is too broad. Resp. Br. at 27. Aside from the fact that this notion is contradicted directly by the record evidence below,[5] the distinction Respondent attempts to draw is without merit. As made plain both herein above and in Petitioner's initial brief before this Court, Georgia's life-sentenced inmates have no legitimate claim to an expectation of parole.

Moreover, as shown above, the application of the reconsideration set-off rule is clearly based upon the Board's individualized determination of the inmate's near-term likelihood for parole by the body with the ultimate decision-making power. The fact that the Georgia General Assembly has acted aggressively to protect the citizens of this State by authorizing life sentences to be imposed upon perpetrators (or repeat perpetrators) of serious felony offenses, all but one of which necessarily include either violence or the threat of violence, is wholly inapposite to this inquiry.

Respondent next argues that because Georgia does not have an elaborate procedural matrix through which these decisions must pass, there are inadequate "procedural safeguards" to ensure against "unjustified postponements." Resp. Br. at 30. Again, Respondent misses the point that it is the Board alone that determines whether he or any life-sentenced inmate will ever be released. Apparently, Respondent would read this Court's decision in *Morales* to require parole boards

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[5] J.A. 49-50.

vested with broad autonomy and discretion (as is Georgia's) to yield significant portions of that autonomy and discretion to other governmental entities merely so that it can have the discretion to extend the term of the mandatory reconsideration set-off for inmates which it alone decides will ever be released from prison. Such an argument is counterintuitive and without merit.

Also, Respondent's arguments consistently ignore the existence of the Board's authority, demonstrated herein above, to reconsider any inmate within its jurisdiction for parole at any time. Such authority, based upon the broad constitutional and statutory powers of the Board, is manifested by the Board's policy statement, as well as its own practices. *See, e.g.*, J.A. 49-50; Appendices One, Two.

Finally, Respondent would have this Court believe that the change in Georgia's mandatory parole reconsideration cap is not intended to reduce the Board's administrative burden. This argument strains credulity, as any knowledgeable observer of prison litigation understands that the burgeoning prison populations are creating new imperatives nation-wide that corrections-related entities focus their limited resources where they can be most effective. What would Respondent have this Court believe that the intent of such rule changes are, if not to allow them to focus upon those inmates with realistic near-term prospects for parole? Common sense dictates that this argument is without merit.[6]

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[6] See also Appendix Two, demonstrating that the Board annually reviews approximately ten percent of the more than 5,500 parole-eligible life-sentenced inmates.

The application of the change in Georgia's mandatory parole reconsideration interval to Respondent does not violate the Constitutional prohibition against ex post facto laws. Rather, this change, as shown above and previously by Petitioner, creates only the "most speculative and attenuated possibility" of increasing Respondent's sentence. Respondent's arguments to the contrary, premised as they are upon fallacy and supposition, are without merit.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Petitioner prays that this Honorable Court reverse the decision of the Court of Appeals for the Eleventh Circuit and direct that judgment in this matter be entered in favor of Petitioner.

Respectfully submitted,

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APPENDIX 1

STATE OF GEORGIA

COUNTY OF FULTON

CERTIFICATE

Before me, the undersigned officer authorized to administer oaths in and for the State of Georgia, appeared TRACY D. MASTERS, who, having first been duly sworn, did depose and state on his oath the following, I, TRACY D. MASTERS, am employed as the Director of Legal Services for the State Board of Pardons and Paroles. The Legal Services section is the official custodian of all documents, records, and tapes possessed by the State Board of Pardons and Paroles at its Atlanta headquarters. I further certify that the attached documents represent true and accurate abstractions of Parole Board records related to life-sentenced offenders. Said abstractions of Parole Board records were compiled and released pursuant to the Georgia Open Records Act, O.C.G.A. 50-18-70.

/s/ Tracy D. Masters
Tracy D. Masters
Director of Legal Services
State Board of Pardons and Paroles

Sworn to and subscribed before me
upon this 21st day of December, 1999.

/s/ Debbie Carver
Notary Public
My commission expires:

Notary Public, Spalding County, Georgia
My Commission Expires April 25, 2003

STATE BOARD OF PARDONS AND PAROLES

[Names And Addresses Omitted In Printing]

December 21, 1999

MEMORANDUM

TO: Chris Brasher
Senior Assistant Attorney General

FROM: MPS Michael P. Sullivan, Division Director
Clemency and Parole Selection

RE: Exceptional Reconsiderations of Life Sentenced Inmates FY'99

I have summarized some cases that were reviewed by the Board during FY'99 that were not scheduled for normal reconsideration during that time. The attached list is not exhaustive, but contains certain cases which I or my staff recalled exceptional reconsideration occurring between 07/01/98 and 06/30/99.

MPS/ks

Attachment

SAMPLE OF EXCEPTIONAL CONSIDERATIONS OF LIFE SENTENCE INMATES DURING FY'99

David Mercer Stubbs, EF-280561

- Offense: Kidnapping with Bodily Injury
- Date Sentenced: 06/03/91
- Initial Consideration: March 1998
- Reconsideration Date: March 2006
- Exceptional Reconsideration Date: March 1999
- Status: Granted Parole after serving 8 years

Rose Lee Blalock, EF-154233

- Offenses: Murder and Armed Robbery
- Date Sentenced: 12/18/81 (2 counts concurrent)
- Initial Consideration: December 1987
- Considered/Denied Parole 5 times; upon last scheduled reconsideration by Board during December 1997, a reconsideration date of December 2000 was established
- Exceptional Reconsideration Date: April 1999
- Status: Granted Parole After Serving 18 years, 4 months

Gary Bernard Newberry, EF-247546

- Offense: Murder
- Date Sentenced: 09/27/89
- Initial Consideration: January 1996
- Reconsideration Date: January 2004
- Exceptional Reconsideration Date: July 1999 (under consideration since 02/99)
- Status: Parole Granted after serving 10 years, 6 months

Donald Eugene Morgan, EF-181048

- Offense: Murder
- Date Sentenced: 05/16/85
- Initial Consideration: October 1991
- Reconsideration Date: October 2005
- Exceptional Reconsideration Date: April 1999
- Status: Granted Conditional Reprieve after serving 14 years, 6 months

Janie H. Gibbs, A-79018

- Offense: Murder
- Date Sentenced: 05/08/76 (5 counts, consecutive)
- Initial Consideration: September 1979
- Reconsideration Date: December 2003
- Exceptional Reconsideration Date: March 1999
- Status: Granted Conditional Reprieve after serving 31 years (Was denied clemency on 17 separate considerations)

Larry Dover, EF-153876

- Offense: Murder
- Date Sentenced: 09/03/81
- Initial Consideration: December 1987
- Reconsideration Date: October 2002
- Exceptional Reconsideration Date: February 1999
- Status: Denied Conditional Reprieve, had served 18 years, 2 months (had been considered 5 times previously)

Luther Glenn Lundy, A-65212

- Offense: Murder
- Date Sentenced: 09/26/66
- Status: Paroled April 1981
- Status: Parole Revoked June 1981
- New Offense: Voluntary Manslaughter
- Date Sentenced: September 1981: 18 years concurrent to Life sentence
- Initial Consideration: July 1984 (After Revocation)
- Reconsideration Date: November 2003
- Exceptional Reconsideration Date: May 1999
- Status: Denied Conditional Reprieve, had served 17 years, 11 months (had been considered and denied 7 times since parole revocation and new homicide while on parole)

Annie Jewell Willis, EF-236210

- Offense: Murder and Aggravated Assault
- Date Sentenced: 03/01/89 (Life and 20 years concurrent, respectively)
- Initial Consideration: May 1995
- Reconsideration Date: May 2003
- Exceptional Reconsideration Date: April 1999
- Status: Denied Conditional Reprieve (had served 10 years, 11 months)

J.B. Cooper, A-26034

- Offense: Murder
- Date Sentenced: 01/22/51 (Escaped 11/26/51, not recaptured until he was sentenced on 10/23/80 to 20 years, serve 18 years for the crime of Voluntary Manslaughter)
- Initial Consideration: February 1987
- Reconsideration Date: November 2003
- Exceptional Reconsideration Date: May 1999
- Status: Denied Conditional Reprieve (Allowing for his 29 years, 1 month, 4 days on escape, had served 19 years, 3 months)

Charles V. Parker, EF-194901

- Offense: Murder
- Date Sentenced: 06/04/85
- Initial Consideration: January 1992
- Reconsideration Date: January 2005
- Exceptional Reconsideration Date: February 1999 and September 1999
- Status: Denied Conditional Reprieve on both occasions (had served 14 years, 8 months. Has been considered and denied for parole 3 times previously

---

APPENDIX 2

STATE OF GEORGIA

COUNTY OF FULTON

CERTIFICATE

Before me, the undersigned officer authorized to administer oaths in and for the State of Georgia, appeared TRACY D. MASTERS, who, having first been duly sworn, did depose and state on his oath the following, I, TRACY D. MASTERS, am employed as the Director of Legal Services for the State Board of Pardons and Paroles. The Legal Services section is the official custodian of all documents, records, and tapes possessed by the State Board of Pardons and Paroles at its Atlanta headquarters. I further certify that the attached document represent a true and accurate abstraction of Parole Board records related to life-sentenced offenders for Parole Board actions from July 1, 1998 until June 30, 1999. Said abstraction of Parole Board records was compiled and released pursuant to the Georgia Open Records Act, O.C.G.A. 50-18-70.

/s/ Tracy D. Masters
Tracy D. Masters
Director of Legal Services
State Board of Pardons
and Paroles

Sworn to and subscribed before me
upon this 23rd day of December, 1999.

/s/ Debbie Carver
Notary Public
My commission expires:

Notary Public, Spalding County, Georgia
My Commission Expires April 25, 2003

Reconsideration set-off periods for
life-sentenced inmates denied parole in FY'99

[Graph Omitted In Printing]

Number of cases set-off

Board established reconsideration intervals

1 year – 38 cases
2 years – 24 cases
3 years – 44 cases
4 years – 15 cases
5 years – 20 cases
6 years – 13 cases
7 years – 8 cases
8 years – 372 cases

30.3% of all denials set for reconsideration at < 8 years

Total # of life cases considered for parole in FY'99	624
Total # of life cases denied parole in FY'99	534
Total # of life cases granted parole in FY'99	90
Total # of parole eligible life cases end of FY'99	5,684

DEC 13 1999

No. 99-137

Supreme Court, U.S.
FILED
DEC 13 1999
OFFICE OF THE CLERK

In The

Supreme Court of the United States

J. WAYNE GARNER, *et al.*,

Petitioners,

v.

ROBERT L. JONES,

Respondent.

On Writ Of *Certiorari*
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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377P

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

RETROACTIVE APPLICATION OF THE GEORGIA REGULATION SETTING OFF PAROLE RECONSIDERATION FOR EIGHT YEARS, FOR PRISONERS WHO HAD BEEN ENTITLED TO RECONSIDERATION EVERY THREE YEARS, VIOLATES THE EX POST FACTO CLAUSE 4

A. The History and Purposes of the Ex Post Facto Clause Demonstrate Its Enduring Importance .. 5

B. The Framework Established by *Morales* and Its Precedents Absolutely Forbids Retroactive Application of Laws That Pose a Risk of Increasing Punishment 8

C. Disregard of the *Morales* Analysis, as Urged by the Petitioners, Renders *Morales* Meaningless ... 11

D. Under *Morales*, the Georgia Regulation Poses a Sufficient Risk of Increasing the Measure of Punishment to Violate the Ex Post Facto Clause ... 14

1. The Georgia Regulation Covers Inmates Sentenced for a Vast Array of Crimes for Whom Release on Parole Is Likely 15

2. The Georgia Regulation's Purpose Is to Maximize the Length of Confinement for Life-Sentenced Inmates 17

3. The Georgia Regulation Does Not Afford Inmates a Hearing and Particularized, Written Findings to Ensure That No Delay in Parole Release Results, Whether Intentionally or Through Error 19

TABLE OF CONTENTS – Continued

Page

4. The Length of the Setoff Permitted by the Georgia Regulation Is Much Greater and, Therefore, the Harm Is Not as Speculative or Easily Cured 22

5. In Georgia, There Is No Mechanism to Rectify the Harmful Effect of a Delay in an Inmate's Parole Suitability Finding 27

6. The Remote Possibility of an Expedited Review, Not Enshrined in Georgia Law, is Insufficient Protection Against Increased Punishment..... 27

7. There is No Opportunity for an Administrative Appeal Under the Georgia Parole Scheme..... 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991), *cert. denied*, 501 U.S. 1260 (1991)..... 2, 15, 19, 22, 23, 28

Bailey v. Gardebring, 940 F.2d 1150 (8th Cir. 1991) 28

Beazell v. Ohio, 269 U.S. 167 (1925)..... 8, 9, 10

Chae Chan Ping v. United States, 130 U.S. 581 (1889) 7

Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) 6, 7, 8

California Dep't of Corrections v. Morales, 514 U.S. 499 (1995)..... *passim*

Collins v. Youngblood, 497 U.S. 37 (1990) 9, 10

Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) ...5, 7

Dobbert v. Florida, 432 U.S. 282 (1977) 21

Ex parte Garland, 70 U.S. (4 Wall.) 333 (1867)..... 7

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 7

Fletcher v. Williams, 688 N.E.2d 635 (Ill. 1997)..... 13

Furnari v. Zavaras, 914 P.2d 508 (Colo. Ct. App. 1996)..... 13

Glavan v. Press, 347 U.S. 522 (1953)..... 7

Hill v. Jackson, 64 F.3d 163 (4th Cir. 1995) 12

Hopt v. Utah, 110 U.S. 574 (1884)..... 10

Jones v. Garner, 164 F.3d 589 (11th Cir. 1999) .... *passim*

Jordan v. Tennessee Board of Paroles, 1997 Tenn. App. LEXIS 27 (Jan. 16, 1997) 13

TABLE OF AUTHORITIES – Continued

Page

Kring v. Missouri, 107 U.S. 221 (1883) 5

Lindsey v. Washington, 301 U.S. 397 (1937) 29

Lynce v. Mathis, 519 U.S. 433 (1997) ..... *passim*

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 6

Miller v. Florida, 482 U.S. 423 (1987) 11

Roller v. Gunn, 107 F.3d 227 (4th Cir. 1997) 12, 13

Ruip v. United States, 555 F.2d 1331 (6th Cir. 1977) 28

Shabazz v. Gabry, 123 F.3d 909 (6th Cir. 1997) 12, 28

Smith v. United States Parole Commission, 875 F.2d 1361 (9th Cir. 1988) 28

Sultenfuss v. Snow, 35 F.3d 1494 (11th Cir.), *cert. denied*, 513 U.S. 1191 (1995) 28

Tuff v. State, 732 So.2d 461 (Fla. 3 DCA 1999) 13, 19

Warden v. Marrero, 417 U.S. 653 (1974) 7

Weaver v. Graham, 450 U.S. 24 (1981) ..... *passim*

Wolff v. McDonnell, 418 U.S. 539 (1974) 7

CONSTITUTIONAL PROVISIONS

U.S. Const., art. I, § 9, ¶ 3 5

U.S. Const., art. I, § 10, ¶ 1 5

Ga. Const., art. IV, § 2, ¶ 1 26

STATUTES

Cal. Penal Code § 3041.5 (West 1999) 20

O.C.G.A. § 16-11-160 (1999) 16

TABLE OF AUTHORITIES – Continued

Page

O.C.G.A. § 16-13-30 (1999) 16

O.C.G.A. § 42-9-42 (1997) 25

O.C.G.A. § 42-9-42(a) (1997) 26, 28

O.C.G.A. § 42-9-43 (1997) 25

O.C.G.A. § 42-9-45 (1997) 28

O.C.G.A. § 42-9-45(f) (1997) 24

O.C.G.A. § 42-9-53 (1997) 21

REGULATIONS

Ga. Comp. R. & Regs. r. 475-3-.05(2) (1969) 22

Ga. Comp. R. & Regs. r. 475-3-.05(2) (1995) 20, 22

BOOKS

The Federalist No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961) 6

The Federalist No. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961) .....

Laurence H. Tribe, American Constitutional Law (2d ed. 1988) 6

PUBLICATIONS

Effects of 2-Strikes Law Eyed, Chattanooga Free Press, June 20, 1998, at A3 18

Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261 (1998) 5

TABLE OF AUTHORITIES – Continued

Page

James Salzer, *Managing Prison Overflow; Commission Formed to Develop Guidelines,* Fla. Times-Union, Georgia Ed., June 2, 1998, at A1..... 15

JoAnne D. Spotts, *Sentence and Punishment: Provide for the Imposition of Life Sentence Without Parole,* 10 Ga. St. U. L. Rev. 183 (1993)..... 16

OTHER AUTHORITIES

State of Georgia Board of Pardons and Paroles, *News Releases,* "It's a Fact" (visited Dec. 8, 1999), <http://www.pap.state.ga.us/NewRelea.nsf> 18

Georgia State Board of Pardons and Paroles, *Frequently Asked Questions,* "How is a decision reached by Board Members?" (visited Dec. 8, 1999) <http://www.pap.state.ga.us/FQFrames.htm>..... 20

Georgia State Board of Pardons and Paroles, *News Releases,* "Parole Board Pursues Appeal" (visited Dec. 8, 1999) <http://www.pap.state.ga.us/NewRelea.nsf> 15

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Georgia is one of its statewide affiliates. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases involving the fair administration of justice, both as direct counsel and as *amicus curiae*. The proper interpretation of the Ex Post Facto Clause is therefore a matter of great concern to the ACLU and its members, as it was to the Framers of the Constitution.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3 of this Court. Pursuant to Rule 37.6, *amici curiae* state that their counsel authored this brief in its entirety. No person or entity other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is the promotion of the proper administration of justice.

SUMMARY OF THE ARGUMENT

The question presented in this case is whether the retroactive application of a Georgia regulation governing parole consideration is a violation of the Ex Post Facto Clause of the United States Constitution. The regulation, as amended in 1986, extended the time between parole reconsideration reviews from three years to eight years for life-sentenced inmates who previously have been denied parole. In 1991, the Eleventh Circuit held that the retroactive application of the amendment to inmates sentenced before the amendment was adopted was an ex post facto violation. *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991). In 1995, after this Court decided *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995), the Georgia State Board of Pardons and Paroles concluded that *Akins* had been overruled and again began to apply the eight-year rule retroactively to inmates whose offenses occurred before 1986. Reaffirming *Akins*, in *Jones v. Garner*, the United States Court of Appeals for the Eleventh Circuit carefully applied *Morales* to the Georgia regulation and again prohibited its retroactive application. *Jones v. Garner*, 164 F.3d 589 (11th Cir. 1999).

The Petitioners ask the Court to reverse the Eleventh Circuit and to hold that a Georgia law retroactively extending the time between parole reconsiderations from three years to eight years for all Georgia inmates serving life sentences does not violate the Ex Post Facto Clause. They ask the Court to do so despite the fact that the result

of this retroactive change in the law will certainly be an increase in jail time for a significant number of inmates, since Georgia law contains virtually no procedural safeguards to ensure that inmates whose parole reconsideration is set off would not otherwise have a chance of release in the interim.

Petitioners rely entirely on *Morales*, in which the Court examined a California statute permitting the state parole board to delay parole reconsideration hearings from every year to up to every three years, but only for inmates convicted of multiple murders and only where the board made an individual, particularized finding that the inmate had no reasonable chance of parole in the intervening years. Petitioners' reliance on *Morales* is misplaced and overlooks the critical distinctions between the Georgia law at issue here and the California law considered in *Morales*. These distinctions include the following: the class of prisoners affected by the change in the law is much broader in Georgia; the true purpose of the Georgia amendment is to maximize time served for the affected class; the Georgia law contains no procedural safeguards, such as the right to a hearing and particularized findings that the chance of the inmate being found suitable for release before the next review is highly unlikely; the duration of Georgia's allowable setoff is much greater; and there are insufficient mechanisms under Georgia law to remedy any impermissible effect of retroactive application of the amendment.

These distinctions go to the heart of the Ex Post Facto Clause, which the Framers of the U.S. Constitution believed essential to protect citizens' settled expectations regarding the punishment attached to crimes at the time

they are committed and to protect against arbitrary, vindictive, and politically inspired legislation. The Court has always understood the Clause to prevent state legislatures from retroactively increasing punishment beyond what it was at the time of the crime's commission. The Court has always understood, too, that the retroactive deprivation of opportunities for release on parole is a form of increased punishment and is therefore unconstitutional under the ex post facto prohibition.

The Eleventh Circuit correctly applied *Morales* to the Georgia amendment, which poses a sufficient risk of retroactively increasing time served for a broad class of inmates to violate the Ex Post Facto Clause. The Eleventh Circuit's opinion should therefore be affirmed.

ARGUMENT

RETROACTIVE APPLICATION OF THE GEORGIA REGULATION SETTING OFF PAROLE RECONSIDERATION FOR EIGHT YEARS, FOR PRISONERS WHO HAD BEEN ENTITLED TO RECONSIDERATION EVERY THREE YEARS, VIOLATES THE EX POST FACTO CLAUSE.

An examination of the history and purposes of the Ex Post Facto Clause, the Court's consistent application of the Clause to forbid laws that retroactively increase punishment, and the Court's recent opinions in *Morales* and *Lynce v. Mathis*, 519 U.S. 433 (1997), compels the conclusion that the Georgia regulation permitting an eight-year delay in parole reconsideration is an ex post facto violation.

A. The History and Purposes of the Ex Post Facto Clause Demonstrate Its Enduring Importance.

> The Framers of the U.S. Constitution adopted the Ex Post Facto Clause to protect future Americans against oppressive, retroactively imposed legislative enactments. The enduring prominence of the clause stems as much from its location in Article I, a position otherwise reserved for structural issues of broad democratic governance, as from its empathic prohibition:
>
> "No state shall . . . pass any . . . ex post facto law."[2]

Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1275 (1998) (quoting U.S. Const., art. I, § 10, ¶ 1). At its essence,

> [t]he ex post facto prohibition forbids the Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed."

Weaver v. Graham, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-326 (1867)).

The strength of the Framers' fears over ex post facto laws can scarcely be exaggerated. They considered retroactive laws to be "contrary to the first principles of the

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[2] The Framers prohibited Congress, as well as the states, from passing ex post facto laws. U.S. Const. art. I, § 9, ¶ 3; *see Weaver v. Graham*, 450 U.S. 24, 28 n.8 (1981) (" 'So much importance did the [c]onvention attach to [the ex post facto prohibition], that it is found twice in the Constitution.' ") (quoting *Kring v. Missouri*, 107 U.S. 221, 227 (1883)).

social compact, and to every principle of sound legislation." The Federalist No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961); *see* The Federalist No. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (ex post facto prohibition is among the three "greate[st] securities to liberty and republicanism [the Constitution] contains.").

For the Framers, the first or fundamental principles of republicanism included the idea that government must have both reliability and regularity.[3] Reliability in government means that citizens must have fair notice of the law and be able to rely on it to protect their settled expectations. Regularity encompasses the idea that laws should be prospective, general, and impartial.[4] It is from these concepts that the Framers' distrust of ex post facto laws derived.[5]

First, "[t]hrough [the ex post facto] prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. at 28-29; *see Calder v. Bull*, 3 U.S. (3 Dall.)

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[3] *See* Laurence H. Tribe, American Constitutional Law at 629 (2d ed. 1988).

[4] As Chief Justice John Marshall eloquently stated these principles, "a government of laws, and not of men" is the "very essence of civil liberty." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

[5] This Court has observed that "[t]he ex post facto prohibition also upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." *Weaver*, 450 U.S. at 29 n.10.

386, 388 (1798). In the parole context, retroactive lawmaking evokes this concern because, as the Court has long recognized, a " 'prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.' " *Lynce v. Mathis*, 519 U.S. at 445-446 (quoting *Weaver*, 450 U.S. at 32); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974); *Warden v. Marrero*, 417 U.S. 653, 658 (1974).

A second but no less significant concern giving rise to the Ex Post Facto Clause was the fear of "arbitrary and potentially vindictive legislation" and the questionable motives and passing political forces that can give rise to it. *Weaver v. Graham*, 450 U.S. at 29. As Chief Justice John Marshall observed:

> Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the Framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment. . . .

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137-38 (1810).[6] Retroactive parole laws have many of the earmarks of

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[6] This Court has applied the Clause relatively infrequently since its origin, most often, as Chief Justice Marshall predicted, in response to legislative enactments directed towards maligned persons "of the moment." *Fletcher*, 10 U.S. (6 Cranch) at 138. Thus, for example, the Court has addressed ex post facto challenges to retroactive legislation resulting in deportation on the basis of political sympathies during "red scares," *see Glavan v. Press*, 347 U.S. 522 (1953); changes in resident alien status during times of ethnic distrust, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); and revocation of professional privileges enjoyed by those sympathetic to the cause of the Confederacy in the wake of the Civil War. *See Ex parte Garland*, 70 U.S. (4 Wall.) 333 (1867); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867).

politically motivated legislation feared by the Framers because such laws, by definition, affect society's most despised and least politically powerful element.

In striking down a law that delayed inmates' eligibility for early release, this Court recently reaffirmed the vitality of the ex post facto prohibition in the parole context:

> The specific prohibition of ex post facto laws is only one aspect of the broader constitutional protection against arbitrary changes in the law. In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its law-making power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and powerful, . . . but also the indigent defendant engaged in negotiations that may lead to an acknowledgement of guilt and a suitable punishment.

Lynce, 519 U.S. at 440 (citations omitted).

B. The Framework Established by *Morales* and Its Precedents Absolutely Forbids Retroactive Application of Laws That Pose a Risk of Increasing Punishment.

In *Calder v. Bull*, the Supreme Court interpreted the Ex Post Facto Clause to encompass not only every law that criminalizes an act that was not criminal at the time the act was done, but also "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." 3 U.S. (3 Dall.) at 390. In *Beazell v. Ohio*, 269 U.S. 167 (1925), the Court noted that it "is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute . . . which makes more burdensome the

punishment for a crime, after its commission, . . . is prohibited as ex post facto." 269 U.S. at 169-170. Recently, in *Collins v. Youngblood*, 497 U.S. 37, 43 (1990), the Court held that: "[T]he Beazell formulation is faithful to our best knowledge of the original understanding of the Ex Post Facto Clause: Legislatures may not retroactively . . . increase the punishment for criminal acts."[7]

In *California Dept. of Corrections v. Morales*, the Court applied this formulation to determine whether retroactive alteration of a law governing the frequency of parole consideration hearings violated the Ex Post Facto Clause, holding, "the focus of the ex post facto inquiry is . . . on whether any such change . . . increases the penalty by which a crime is punishable." 514 U.S. at 506 n.3; *see Lynce v. Mathis*, 519 U.S. at 443.[8]

In *Morales*, the Court expressed wariness of an approach that might require invalidation of "minor . . . mechanical [legislative] changes" that "might create some speculative, attenuated risk of affecting a prisoner's actual term of confinement by making it more difficult for him to make a persuasive case for early release," 514 U.S. at 508, 509; such as, for example, "restrictions on the hours that prisoners may use the prison law library." 514

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[7] In the criminal context, a law is retroactive if it "applies to prisoners convicted for acts committed before the [law's] effective date." *Weaver v. Graham*, 450 U.S. at 31. Petitioners have not challenged that the regulation at issue here is retroactive.

[8] In *Lynce*, the Court squarely held what was implicit in *Morales*, that "retroactive alteration of parole . . . provisions, like the retroactive application of provisions that govern initial sentencing, implicates the Ex Post Facto Clause. . . . " *Lynce*, 519 U.S. at 445.

U.S. at 508. The Court therefore refined the test as follows: "In evaluating the constitutionality of the [change at issue], we must determine whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes."[9] *Morales*, 514 U.S. at 509.

In determining whether the amendment produces "a sufficient risk of increasing the measure of punishment," the Court held that "what legislative adjustments 'will be held to be of sufficient moment to transgress the constitutional prohibition' must be a matter of 'degree.' " 514 U.S. at 509 (quoting *Beazell*, 269 U.S. at 171). In *Morales*, however, it was clear to the Court that the amendment at issue created "only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes" which, the Court held, was "insufficient under any threshold we might establish under the Ex Post Facto Clause." 514 U.S. at 509. Subsequently, in *Lynce v. Mathis*, the Court emphasized that its holding in *Morales* "rested squarely on the conclusion that 'a prisoner's ultimate date of release would be *entirely unaffected* by the change in the timing of [parole] suitability hearings.' " *Lynce*, 519

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[9] The requirement of more than a *de minimus* risk of increasing the punishment appears to be the *Morales* majority's reformulation of the principle that "merely procedural" changes that substantively do not increase punishment do not violate the Ex Post Facto Clause. *Weaver v. Graham*, 450 U.S. at 31 n.12 (quoting *Hopt v. Utah*, 110 U.S. 574, 590 (1884)). The "procedural" test was difficult to apply because, as the Court recognized, substantial rights may be altered by statutes taking a "seemingly procedural form." *Weaver*, 450 U.S. at 31 n.12; *see Lynce*, 519 U.S. at 447 n.17. The "procedural" language therefore "imported confusion into the interpretation of the Ex Post Facto Clause." *Collins v. Youngblood*, 497 U.S. at 45-46.

U.S. at 444 (quoting *Morales*, 514 U.S. at 513) (emphasis added).[10]

C. Disregard of the *Morales* Analysis, as Urged by the Petitioners, Renders *Morales* Meaningless.

Morales' "conclusion that 'a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings,' " *Lynce*, 519 U.S. at 444 (quoting *Morales*, 514 U.S. at 513), was based on the application of two major factors: First, the change in the law affected only a very limited class of prisoners for whom the likelihood of release was found to be "quite remote" (*i.e.*, multiple murderers). Second, after applying a number of individual factors, the Court concluded that under the California amendment, the parole board's authority was carefully tailored to achieve the amendment's purpose of eliminating futile hearings for those who have no chance of release in the interim. Thus, in *Morales*, the Court engaged in a very fact-specific inquiry leading to its conclusion that there was virtually no risk that the prisoner's ultimate release date would be

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[10] *Morales* reaffirmed that to establish a sufficient risk of prohibited effect, "a party asserting an ex post facto claim need not carry the burden of showing that he would have been sentenced to a lesser term under the measure or range of punishments in place under the previous statutory scheme. . . ." *Morales*, 514 U.S. at 510; *see Miller v. Florida*, 482 U.S. 423, 432 (1987) ("One is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old."); *Weaver v. Graham*, 450 U.S. at 33 ("The inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual.").

affected by the amendment. *See also Lynce*, 519 U.S. at 443-444.

In *Morales* the Court declined to articulate a general proposition or "formula" for identifying ex post facto violations beyond the extreme unlikelihood of harm present in *Morales*, 514 U.S. at 509, and specifically, the Court "express[ed] no view as to the constitutionality of any of the number of other statutes that might alter the timing of parole hearings under circumstances different from those present" in *Morales*. 514 U.S. at 510 n.5.

Despite *Lynce's* reemphasis of *Morales'* case-by-case, fact-specific approach, some courts have read *Morales* too broadly, essentially discarding its analysis to conclude that no retroactive deferral of parole reconsideration presents an Ex Post Facto Clause problem. For example, in *Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997), and *Hill v. Jackson*, 64 F.3d 163 (4th Cir. 1995), the Fourth Circuit upheld the retroactive application of state laws decreasing the frequency of parole reconsideration hearings. In both cases, the class of inmates to which the amendments applied was considerably broader than the class in *Morales*. And, in both cases, there was virtually no discussion of the absence of the procedural safeguards that *Morales* deemed essential to protect inmates against the possibility of an increase in punishment.[11] *See also Shabazz v. Gabry*, 123 F.3d 909 (6th Cir. 1997) (Michigan law at issue decreased the frequency of mandatory parole reconsideration interviews for a very broad class – all inmates

[11] Neither the South Carolina amendment considered in *Roller* nor the Virginia statute at issue in *Hill* required any factual findings regarding the likelihood that parole would be granted in the intervening years. *See Roller*, 107 F.3d at 234-237; *Hill*, 64 F.3d at 169.

serving parolable life or long indeterminate sentences – and required no findings regarding parolability).[12]

Petitioners argue here that *Morales* stands for the general proposition that any law decreasing the frequency of parole reconsiderations can be applied retroactively consistently with the Ex Post Facto Clause. Petitioners' interpretation, if accepted, leads to the inexorable conclusion that a state legislature or parole board's power to increase the time between parole considerations

[12] Other cases cited by Petitioners likewise selectively embrace portions of the *Morales* inquiry and ignore other portions, instead of considering the effect of the parole scheme as a whole, as *Morales* commands. *See, e.g., Furnari v. Zavaras*, 914 P.2d 508, 510 (Colo. Ct. App. 1996) (retroactive statute affected much larger class than in *Morales* and required no express finding regarding likelihood of parole during the intervening years); *Jordan v. Tennessee Board of Paroles*, 1997 Tenn. App. LEXIS 27, * 3 (Jan. 16, 1997) (court engaged in no analysis of *Morales* factors but merely stated conclusively that earlier release under the prior rule was "highly speculative"); *Tuff v. State*, 732 So.2d 461 (Fla. 3 DCA 1999) (statute at issue applied to a much broader class of inmates than in *Morales*, including all inmates convicted of murder, sexual battery, attempted sexual battery, or whose sentences were 25 years minimum mandatory); *Fletcher v. Williams*, 688 N.E.2d 635 (Ill. 1997) (retroactive statute affected all state prisoners).

The Eleventh Circuit's opinion below is not necessarily at odds with the cases cited here because the Georgia amendment goes so far beyond what the Court found acceptable in *Morales*. The Georgia regulation not only applies to the broadest of classes and contains virtually no safeguards, but it also permits the longest setoff between parole reconsiderations of all the statutes considered in the cases cited here. *Cf. Roller*, 107 F.3d at 236 (noting that the South Carolina law only decreased the frequency of parole hearings by one year, while the California statute considered in *Morales* potentially changed the frequency by two years).

is unlimited; therefore, the state could retroactively effectively deny parole altogether by simply delaying reconsideration. For example, the state could retroactively require that an inmate who is first considered for and denied parole a few years into a ten-year sentence need not be reconsidered for another ten years, thus forcing these inmates to serve the entire sentence, even though the inmate was eligible for parole and entitled to annual parole reconsideration when convicted. The central holding of *Morales* and *Lynce*, that laws delaying parole reconsideration do implicate the Ex Post Facto Clause, is meaningful only if the *Morales* inquiry is strictly applied.

D. Under *Morales*, the Georgia Regulation Poses a Sufficient Risk of Increasing the Measure of Punishment to Violate the Ex Post Facto Clause.

The Georgia regulation differs from the California statute examined in *Morales* in several significant ways: (1) the class of affected inmates is much broader; (2) the purpose behind the Georgia regulation is to increase the length of confinement for life-sentenced inmates; (3) the Georgia scheme does not require a hearing and particularized written findings to support a setoff; (4) the setoff under the Georgia regulation is of much longer duration; (5) there is no mechanism to rectify a delayed parole suitability decision; (6) the possibility of Board discretion to expedite reviews, standing alone, is insufficient and too speculative to prevent a sufficient risk of increased punishment; and (7) there is no opportunity for an administrative appeal. Thus, unlike the California amendment, the Georgia amendment poses a constitutionally significant risk of increasing the measure of punishment.

1. The Georgia Regulation Covers Inmates Sentenced for a Vast Array of Crimes for Whom Release on Parole Is Likely.

First, unlike the California amendment, which allowed the parole board to extend the time between parole reconsideration hearings only for those prisoners who had been convicted of "more than one offense which involves the taking of a life," 514 U.S. at 511, the Georgia regulation applies to all inmates serving life sentences. Presumably multiple murderers constitute a very small number of prisoners; in contrast, the Georgia Board of Pardons and Paroles has announced that this case affects some 1400 Georgia inmates. *See* State of Georgia Board of Pardons and Paroles, *News Releases*, "Parole Board Pursues Appeal" (visited Dec. 8, 1999), <http://www.pap.state.ga.us/NewRelea.nsf> (press release dated June 2, 1999).[13] Inmates serving life sentences in Georgia include prisoners convicted not only of (one) murder, but also rape, armed robbery, more than one count of child molestation, and more than one count of possession or

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[13] Indeed, the affected number could be much higher because the 1400 might not include life-sentenced inmates convicted before 1979, who were entitled to annual parole reconsideration. *See Akins*, 922 F.2d at 1560. Also, the 1400 might include only the "limited" subset of life-sentenced inmates to which the Board claims to be retroactively applying the regulation. *See* Petitioners' Brief at 18 n.2. That claim is contradicted by the Board's own written policy, however, which states that the policy is applicable to "all Life Sentence Cases." (J.A. 56). Therefore, the number affected could be much higher, since, according to last year's figures, there were over 5,000 inmates serving parolable life sentences in Georgia prisons. James Salzer, *Managing Prison Overflow; Commission Formed to Develop Guidelines*, The Fla. Times-Union, Georgia Ed., June 2, 1998, at A1.

use of certain types of firearms during the commission or attempted commission of a series of enumerated offenses (such as robbery, involuntary manslaughter, sale or possession of controlled substances, influencing witnesses, and criminal gang activity).[14] *See Jones v. Garner*, 164 F.3d at 593-594 and statutes cited therein. Inmates serving life sentences also include inmates convicted of more than one count of any offense involving the manufacture, delivery, sale, or distribution of certain controlled substances. *See* O.C.G.A. § 16-13-30 (1999). Violence is not an element of these drug-related offenses. *Id.*

As the Eleventh Circuit concluded, because Georgia law does not impose a sentence of life in prison without parole for each of these offenses, the set of inmates whose parole will be affected by the regulation must include many inmates who can expect to be paroled at some point. *Jones*, 164 F.3d at 594. Indeed, according to recent statistics, the average Georgia inmate serving a life sentence was released on parole after serving twelve years. *See* JoAnne D. Spotts, *Sentence and Punishment: Provide for the Imposition of Life Sentence Without Parole*, 10 Ga. St. U. L. Rev. 183, 183 (1993). Thus, in contrast to the statute considered in *Morales*, the Georgia regulation is not limited "only to a class of prisoners for whom the likelihood of release on parole is quite remote." 514 U.S. at 510. To the contrary, it broadly applies to a class of prisoners who have been released historically after serving an average of twelve years.

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[14] The enumerated offenses are set forth in O.C.G.A. § 16-11-160 (1999).

2. The Georgia Regulation's Purpose Is to Maximize the Length of Confinement for Life-Sentenced Inmates.

Unlike *Morales*, in which the record contained an articulated legislative purpose of saving time and money, the record here contains no evidence whatsoever of the purpose behind the amended regulation.[15] The Petitioners' unsubstantiated assertion that there could be no other purpose than to save time and expense, in the absence of evidence of the legislative purpose, is insufficient. *See Lynce*, 519 U.S. at 445.[16] Here, the Board's own statements demonstrate that the amendment was not intended to save time and expense that would otherwise be incurred in reviewing inmates who have only the remotest chance of making parole, as was the case in California.[17] Rather, as in *Lynce*, the regulation was

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[15] In *Lynce*, the Court recognized that it had never had the occasion to decide whether a legislative change with the purpose, but not the effect, of increasing punishment would be a sufficient basis for concluding that the law violated the Ex Post Facto Clause. *Lynce*, 519 U.S. at 444. The Court nevertheless emphasized the need to assess the purpose behind the change in the sentencing scheme as well as the possible effect on offenders' sentences. *Id.* at 444-445; *see Jones*, 164 F.3d at 593.

[16] The Court concluded in *Lynce*:

> Here, unlike in *Morales*, there is no evidence that the legislature's change in the sentencing scheme was merely to save time or money. Rather, it is quite obvious that the retrospective change was intended to prevent the early release of prisoners convicted of murder-related offenses. . . .

Id.

[17] Indeed, since Georgia inmates are not entitled to formal, in-person hearings as they would be in California, there has

changed to increase the time life-sentenced inmates actually serve and thereby to avoid criticism (and defeat political efforts to abolish parole) by impressing upon the public and the legislature that the Board is doing everything in its power to keep offenders in prison as long as possible. *See, e.g., Effects of 2-Strikes Law Eyed*, Chattanooga Free Press, June 20, 1998, at A3 ("The Board of Pardons and Paroles is already limiting the number of violent criminals being freed. . . . 'We want the public to realize . . . [o]btaining parole on a life sentence case is increasingly rare,' said Walter Ray, the board's chairman."); *see* State of Georgia Board of Pardons and Paroles, *News Releases*, "It's a Fact" (visited Dec. 8, 1999), <http://www.pap.state.ga.us/NewRelea.nsf> (press release dated Oct. 7, 1998) ("It's a fact: In Georgia, parole has already been abolished for the seven most violent crimes. . . . Under current Georgia law and parole board policy, the majority of violent criminals must serve all or very close to all of their court-imposed sentences. . . . ").

Furthermore, the California statute in *Morales* was carefully designed to permit a brief setoff only for as long as an inmate could not reasonably expect to be paroled. Here, in contrast, the Board's own policy states that its goal is "to establish the maximum possible interval, in a Life Sentence Case, between a decision to deny parole and the time at which reconsideration for parole will occur," State Board of Pardons and Paroles Policy No. 4.110 (J.A. 56), without regard to any reasonable likelihood that the inmate might be released.

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been no showing that holding reviews at least every three years, as the Board was required to do under prior law, imposed any real burden on the Board.

This evidence entitles the Court to find, as the Court found in *Lynce*, that "it is quite obvious" that the retrospective change in Georgia law was intended to keep prisoners convicted of certain offenses in prison longer. *Lynce*, 519 U.S. at 445; *see Jones*, 164 F.3d at 593. This purpose supports the conclusion that the Georgia amendment violates the ex post facto prohibition.

3. The Georgia Regulation Does Not Afford Inmates a Hearing and Particularized, Written Findings to Ensure That No Delay in Parole Release Results, Whether Intentionally or Through Error.

The Georgia regulation contains no mandatory procedural safeguards to ensure that the delaying of parole reconsideration does not increase the time actually served by any inmate.[18] Crucial to the Court's decision in *Morales* was the fact that the California statute required that the parole board (1) conduct "a full hearing and review" of all facts relevant to the prisoner's eligibility for parole, 514 U.S. at 511; (2) make "particularized findings," 514 U.S. at 512, that "it is not reasonable to expect that parole would be granted at a hearing during the following years," 514 U.S. at 511; and (3) state in writing the basis for those findings. *Id.* The "full hearing and

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[18] *See Tuff*, 432 So.2d at 466 (concluding that, because of its mandatory procedures and findings, the Florida law at issue was much more like the California statute in *Morales* than the Georgia regulation considered in *Akins* and *Jones*: "[The Florida law] does not share the defects of the Georgia rule noted by the Eleventh Circuit.").

review" afforded by the California statute gives the inmate the right to review his or her file and to enter a written response to anything contained in the file; to "be present, to ask and answer questions, and to speak on his or her own behalf;" to request and receive a transcript of all proceedings; and to have legal counsel or another designated person present at the hearing to ensure that "all facts relevant to the decision" are presented. Cal. Penal Code § 3041.5 (West 1999). Moreover, the California parole board must send the prisoner a written statement of the reasons for the denial and also suggest activities in which the prisoner might participate while in prison to increase his or her chances for parole the next time. *Id.*

In contrast, the Georgia regulation provides in its entirety:

> Reconsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possible discouraging diagnostic opinions.

Ga. Comp. R. & Regs. r. 475-3-.05(2) (1995). The prisoner gets no hearing; the "reconsideration" is merely a paper review by the individual Board members of the inmate's file. *Jones*, 164 F.3d at 594-595; *see* State of Georgia Board of Pardons and Paroles, *Frequently Asked Questions*, "How is a decision reached by Board Members?" (visited Dec. 8, 1999), <http://www.pap.state.ga.us/FQFrames.htm>. Georgia law does not require the Board to make any findings that the inmate will not be suitable for parole before the next reconsideration and the Board is not required to state the reasons for any setoff between reconsiderations up to eight years. *See Jones*, 164 F.3d at 594,

595; *see, e.g.*, J.A. 52-54 (Jones' notices of parole denial and setoff giving no reason for the setoff). Indeed, the Board gives only the most conclusory and general reasons for the parole denial itself. *See* J.A. 54 ("The main reasons for the [Board's] decision [to deny parole at this time] cited by the Board members during their individual study of your case are circumstances and nature of the offense, and multiple offenses."). The inmate has no right even to review his parole file to see if it includes incomplete or erroneous information. *See* O.C.G.A. § 42-9-53 (1997).

Petitioners' argument, that because Georgia law does not require a hearing or any procedural safeguards when the Board considers an inmate for parole, it should not have to hold a hearing or extend any procedural safeguards simply to delay reconsideration, misses the point. The procedural safeguards essential to the Court's decision in *Morales* served to ensure that, in fact, the "quantum of punishment" would not be increased by the retroactive application of the amendment. 514 U.S. at 508 (quoting *Dobbert v. Florida*, 432 U.S. 282, 293-294 (1977)). Put differently, retroactive application of the California law was, on its face, violative of the Ex Post Facto Clause. However, the stringent procedural safeguards California law imposed saved that particular law by reducing the probability of an impermissible effect (*i.e.*, increasing the prisoner's length of confinement) arising from the retroactive application to virtually zero. In Georgia, there is simply nothing to save the retroactive application of the regulation by limiting its effect to a constitutionally insignificant possibility of increasing the inmate's jail time.

4. The Length of the Setoff Permitted by the Georgia Regulation Is Much Greater and, Therefore, the Harm Is Not as Speculative or Easily Cured.

The change in the timing of parole consideration authorized by the Georgia regulation is much more drastic than in *Morales*. The California amendment entitles the inmate to a reconsideration hearing every year by default, but permits the parole board to depart from the default and delay hearings for one to two years upon specified, individual findings. The Georgia regulation, in contrast, increases the allowable time between reconsiderations in all cases to eight years, an interval five years longer than was permitted before the amendment. *See* Ga. Comp. R. & Regs. r. 475-3-.05(2) (1995) (reconsideration "shall take place at least every eight years.").[19]

This drastic increase in the time between parole reconsiderations places the Georgia regulation well beyond the "micromanagement" of "innocuous" legislative adjustments that the Court sought to avoid in *Morales*. 514 U.S. at 508. As the Eleventh Circuit concluded in *Akins* after careful analysis of the Georgia parole statutes and regulations, inmates are effectively ineligible for parole between such reviews:

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[19] For inmates convicted before 1979, who were eligible for annual parole reconsideration under the regulation in effect at that time, the change in the law increased their allowable setoff by seven years. *See Akins*, 922 F.2d at 1560; Ga. Comp. R. & Regs. r. 475-3-.05(2) (1969).

The length of the allowable setoff, as well as the change in the allowable setoff, is greater under the Georgia amendment than under any of the state laws delaying parole reconsideration that have been upheld by other courts. *See* cases cited *supra* at 13 n.12.

> Under the Georgia parole system, an inmate serving a life sentence becomes eligible for parole consideration after serving seven years of his sentence. This means that the inmate is given a parole consideration hearing, and the Board then determines if he is suitable for release based on a number of factors. If the inmate is denied parole at this initial hearing the Board schedules a parole reconsideration hearing at a later date. If the inmate is denied parole at the reconsideration hearing, the Board schedules the inmate for another reconsideration hearing at a later date. Since the Board is required to hold some type of parole reconsideration hearing before granting parole, an inmate is effectively ineligible for parole between two parole reconsideration hearings. Because an inmate is not paroled without a parole reconsideration hearing, the hearing must be considered an essential part of parole eligibility.

Akins, 922 F.2d at 1561.[20] Thus, an eight-year setoff in parole reconsideration is effectively an eight-year delay in parole unless it could somehow be shown that the inmate had "no reasonable chance" of parole during that eight years. *Morales*, 514 U.S. at 507. Such a showing is impossible when the setoff is eight years long.

While it is true that the Board of Pardons and Paroles exercises complete discretion in determining whether or not to parole any individual inmate,[21] the statutory

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[20] In using the terms "parole consideration hearing" and "parole reconsideration hearing," the Eleventh Circuit did not imply that the inmate receives an actual hearing. *See id.* at 1561 n.8.

[21] This Court has repeatedly rejected the Board's argument that because it enjoys broad discretion whether to parole any

scheme clearly contemplates parole for the affected class, prisoners serving life sentences. O.C.G.A. § 42-9-45(f) (1997). Recent statistics show that, in fact, the average term actually served on a life sentence was twelve years. While the Board makes light of the Eleventh Circuit's observation that "eight years is a long time," Petitioner's Brief at 27 (quoting *Jones v. Garner*, 164 F.3d at 595), the average life sentence actually served puts this number in context. Contrary to the Board's unsupported assertion that no one serving a life sentence has other than the remotest chance of release on parole, *see* Petitioner's Brief at 18 n.2; statistically, under the law in effect when Mr. Jones and other inmates were sentenced, the average life-sentenced inmate could reasonably expect to be paroled sometime between his second parole consideration, which would have occurred at ten (7 + 3) years, and his third, at thirteen years. Under the amended regulation, however, if an inmate is turned down for parole at his first consideration, he will have served fifteen years before the Board is even required to reconsider him.[22]

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individual inmate under Georgia law, no ex post facto claim is cognizable against it. *See Weaver*, 450 U.S. at 29-30 ("a law need not impair a 'vested right' to violate the ex post facto prohibition. . . . Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.").

[22] In contrast, *Morales* noted that in California, 85 percent of inmates were found to be unsuitable for release at the second reconsideration hearing, which, under the amended California law, would occur after the inmate had served 12 years, at the latest. *See* 514 U.S. at 510-511.

The Eleventh Circuit's conclusion that eight years is too long is supported by its finding that under the Georgia parole scheme, "[m]uch can happen in the course of eight years to affect the determination that an inmate would be suitable for parole." 164 F.3d at 595. For example, Georgia law dictates that the Board,

> in considering any case within its power, *shall* cause to be brought before it all pertinent information on the person in question. *Included therein shall be*:
>
> (1) A report . . . upon *the conduct of record of the person while in such jail or state or county correctional institution;*
>
> (2) The results of such of *physical and mental examinations* as may have been made of the person;
>
> (3) *The extent to which the person appears to have responded to the efforts made to improve his social attitude;*
>
> (4) The *industrial record of the person while confined, the nature of his occupations while so confined* . . . ; and
>
> (5) The *educational programs in which the person has participated and the level of education which the person has attained* based on standardized reading tests.

O.C.G.A. § 42-9-43 (1997) (emphasis added). Moreover, "[g]ood conduct, achievement of a fifth grade level or higher . . . and efficient performance of duties by an inmate *shall be considered by the board* in his favor. . . . " O.C.G.A. § 42-9-42 (1997). These statutes, passed by the Georgia legislature and binding on the Board, contradict the Board's assertion that only the nature and circumstances of the offense are relevant to parole decisions for life-sentenced inmates. *See* Petitioners' Brief at 19-20, 26

n.8. Moreover, by their very nature, each one of these factors is likely to change substantially over an eight-year period.[23]

Oddly, the Board argues that the delay in parole reconsideration from every three to eight years will somehow have the effect of encouraging inmates' attempts at rehabilitation. Petitioners' Brief at 16-17. The Board offers absolutely no support for what is not even a logical proposition since, according to the Board, the primary factors in parole decisions for inmates like Mr. Jones, who are most likely to suffer the longest setoffs, are the nature and circumstances of the crime and criminal history, which the inmate cannot change. The Board's bold assertion that a setoff for eight years, without giving the prisoner any reasons for the setoff and without any indication of what the Board expects the prisoner to do to improve himself (unlike the California statute, which requires both), somehow "provides an indication of how extensive [the prisoner's] efforts [at self-improvement] must be" is nonsensical. Petitioner's Brief at 17.

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[23] By Georgia law, an inmate may not obtain parole until he receives the favorable vote of a majority (three) of the five member Board. *See* O.C.G.A. § 42-9-42(a) (1997). The Board serves seven-year, staggered terms by appointment of the Governor. Ga. Const. art. IV, § 2, ¶ 1. The composition of the Board therefore can change greatly during an eight-year setoff, which is longer even than the term of the Board members. Indeed, three of the five Board members, including the chairman, have changed since Jones filed his lawsuit in November 1995. *See* Petitioners' Brief at ii. Not only will the composition of the Board change during such a long setoff, but attitudes about punishment and the role of education, rehabilitation, occupation, and retribution are likely to change as well.

5. In Georgia, There Is No Mechanism to Rectify the Harmful Effect of a Delay in an Inmate's Parole Suitability Finding.

Morales concluded that the California statute had a negligible risk of increasing any inmate's punishment because, under the California parole scheme, an inmate's actual release date often comes years after a finding of suitability. The Court therefore reasoned that any delay in the finding of suitability could be rectified by an earlier release date. There is no analog to this factor in Georgia law; if there were, the Board clearly would have made such an argument, but it did not.

6. The Remote Possibility of an Expedited Review, Not Enshrined in Georgia Law, is Insufficient Protection Against Increased Punishment.

In *Morales*, the Court also considered that under California law, in the years between reconsideration hearings, a prisoner could cure any possible delay through the opportunity to request an expedited hearing in the event of new information or a change in the inmate's circumstances. Even assuming that the same opportunity is available in Georgia, the Court did *not* hold that the opportunity for an expedited hearing, *in the absence of any other safeguards*, is sufficient to prevent an impermissible delay in parole, and it is not sufficient here.

Despite its internal policy statement,[24] which states that inmates "may receive expedited parole reviews in

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[24] Unlike the statute passed by the California legislature, this internal operating policy does not have the force of law – as the Board implicitly acknowledges by characterizing the policy merely as the Board's "own interpretation of the requirements

the event of a change in their circumstance or where the Board receives new information that would warrant a sooner review" (J.A. 56), the Board offers no evidence that any inmate ever has or will be released on parole between regular reconsiderations. To the contrary, the Georgia statutory scheme and regulations indicate that Board members do not vote on whether to parole an inmate other than during formal reconsiderations; and an inmate cannot be released on parole except by a majority vote. O.C.G.A. § 42-9-42(a); *see Akins*, 922 F.2d at 1561.

Furthermore, Georgia law requires the Board to make a regulation setting periodic parole reconsideration, at which time reconsideration shall be "automatic." O.C.G.A. § 42-9-45. In contrast, the fact that inmates "may receive" an expedited review under the Board's internal "policy" based on changed circumstances or new information shifts the burden to the inmate to request, subject to the Board's absolute discretion, what previously came

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upon it." Petitioners' Brief at 27 n.10. Indeed, the Board has consistently maintained that its own policies and procedures are not binding upon it, a position which the courts have repeatedly affirmed. *See, e.g., Sultenfuss v. Snow*, 35 F.3d 1494, 1500-1503 (11th Cir.), *cert. denied*, 513 U.S. 1191 (1995). In addition, an internal operating policy like the one cited by the Board has been held to be incapable of creating a right protectable by the Ex Post Facto Clause because of its purely discretionary and unenforceable nature, *see Shabazz v. Gabry*, 123 F.3d at 915; *Ruip v. United States*, 555 F.2d 1331, 1335 (6th Cir. 1977); *Bailey v. Gardebring*, 940 F.2d 1150, 1156-1157 (8th Cir. 1991); *Smith v. United States Parole Commission*, 875 F.2d 1361, 1367 (9th Cir. 1988); therefore, such a policy should not be capable of curing an ex post facto violation.

to him automatically.[25] Indeed, the denial and setoff notice given to inmates does not even inform them of their right to petition for an expedited review based on changed circumstances. *See, e.g.*, J.A. 52-54.

7. There is No Opportunity for an Administrative Appeal Under the Georgia Parole Scheme.

In addition to the opportunity for expedited interim review, in *Morales* the Court also suggested that the possibility of an administrative appeal "would remove any possibility of harm." 514 U.S. at 513. Petitioners do not contend here that any administrative appeal is available.

In sum, it simply cannot be said that there is "only the most speculative and attenuated possibility" of increased punishment in this case. The amended regulation applies to a large, broad class of prisoners. No hearing or particularized findings of any kind, including that the inmate is unlikely to be suitable for parole before the next reconsideration, are required. The length of the setoff is five years longer, more than two and one-half times greater, than the longest setoff permitted under the California law at issue in *Morales*. Eight years can pass without any requirement that the Board consider the inmate's case. Given the large class of affected inmates, this eight-year interval seems certain to ensure that a significant

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[25] This Court has held that an ex post facto violation is cognizable when a prisoner is deprived of automatic benefits or advantages even where they are replaced by "purely discretionary" ones. *Weaver*, 450 U.S. at 35-36 & n.20; *Lindsey v. Washington*, 301 U.S. 397, 401 (1937). Thus, the Board's purely discretionary application of its policy cannot cure the ex post facto violation here.

number of inmates will find the length of their confinement extended in violation of the Ex Post Facto Clause. *See Jones*, 164 F.3d at 595.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully pray that the Court affirm the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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